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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 503

JACK HARDEMAN, PETITIONER,

vs.

ALBERT T. WITBECK

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 3, 1931

CERTIORARI GRANTED DECEMBER 7, 1931

(36,317)

(36,317)

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IN THE DISTRICT COURT OF THE UNITED STATES
WESTERN DISTRICT OF LOUISIANA.

JACK HARDEMAN,

Plaintiff,

versus

ALBERT T. WITBECK,

Defendant.

No. 227 In Equity.

To the Judge of the District Court of the United States, Western District of Louisiana:

I. Jack Hardeman, a citizen of the United States and of the State of Louisiana, and a resident and inhabitant of Minden, in the Western District of Louisiana, being this his bill of complaint against Albert T. Witbeck, a citizen of the United States and of the State of Louisiana, and a resident and inhabitant of Shreveport, in the Western District of Louisiana, and thereupon complains and says:

II. That plaintiff is a citizen of the United States and of the State of Louisiana, over the age of twenty-one years, is a resident and inhabitant of Minden, in the Western District of Louisiana, and brings this suit in his own right.

III. That plaintiff is informed and believes and therefore alleges that the defendant Albert T. Witbeck is a citizen of the United States and of the State of Louisiana, is over the age of twenty-one years, and is a resident and inhabitant of Shreveport in the Western District of Louisiana. The defendant Albert T. Witbeck is sued in his own right.

IV. That this suit relates to the deposits of oil and gas, if any, in land situated within the Western District of Louisiana, and within the jurisdiction of this Court, and presents for decision the claim of the plaintiff that he is the equitable owner of and entitled to the entire beneficial interest under a permit which the Secretary of the Interior has issued to the defendant and which authorizes the defendant to enter into possession of said land and to prospect the same for oil and gas pursuant the provisions of an Act of Congress. The claim of the plaintiff is that the permit was issued to the defendant as a consequence of error in matters of law committed by the Secretary of the Interior in adjudging that the plaintiff's priority of right to the permit under such Act of Congress, which priority over the defendant the Secretary of the Interior conceded existed at one time, had been forfeited by the plaintiff. The value of the beneficial interest under the said permit is not less than twenty-five thousand ($25,000.00) Dollars.

V. That on November 11, 1923, theretofore, continually ever since and now, plaintiff was, has been and is in all respects duly qualified to apply for and to receive from the Secretary of the Interior of the United States a permit to prospect for deposits of oil or gas under section 13 of the act of Congress of February 25, 1920 (Chap. 85, 41 Stat. 437), commonly known as the "leasing statute," and under the regulations of the Department of the Interior prescribed pursuant to said statute.

VI. That on November 11, 1923, the oil and gas, if any of either, in the north west quarter of the north-east quarter of Section twenty-five in township twenty-one north of range ten west of the Louisiana Meridian in the State of Louisiana were, and ever since have been, and are now, in the ownership of the United States. That the said tract of land was

on said date and ever since has been, and is now, surveyed land of the class with respect to which it is competent for the Secretary of the Interior and the duty of that officer under the law, to issue a permit to prospect for oil and gas pursuant to section 13 of the leasing statute.

1-a

VII. That it is provided in the aforesaid section of the aforesaid statute that if a person qualified to apply for a permit underunder

"shall cause to be erected upon the land for which a permit is sought a monument not less than four feet high, at some conspicuous place thereon, and shall post a notice in writing on or near said monument, stating that an application for permit will be made within thirty days after date of posting said notice, the name of the applicant, the date of the notice, and such a general description of the land to be covered by such permit by reference to courses and distances from such monument and such other natural objects and permanent monuments as will reasonably identify the land, stating the amount thereof in acres, he shall during the period of thirty days following such marking and posting, be entitled to a preference right over others to a permit for the land so indentified."

VIII. That on November 11, 1923, plaintiff located, marked, erected a monument and posted a notice upon the tract of land aforesaid, doing so in the manner, to the extent and conformably to all the provisions and requirements of section 13 of the leasing statute and all the regulations of the Secretary of the Interior thereunder, and within thirty days thereafter, towit, on December 11, 1923, filed in the United States Land Office at Baton Rouge, Louisiana, an application for a permit to prospect the said land for oil and gas under section 13 of the "leasing statute."

IX. That plaintiff's said application complied with and satisfied all the requirements of those provisions of the leasing statute that relate to an application for a permit to prospect for oil and gas pursuant to section 13 thereof. That the Register of the said United States Land Office received, entertained, accepted, filed and recorded such application on the date it was tendered to said office, to-wit, December 11, 1923, and on said date said officer made appropriate notations on the tract books and other records of said office to show that plaintiff claimed, and had filed a due application in the exercise of, a preference right to an oil and gas permit for said land.

X. That on or about the 13th day of December 1923, the Register of the United States Land Office at Baton Rouge, Louisiana, by letter of that date to plaintiff called his attention to the fact that at page 31 of the General Land Office Circular No. 672 (47 Land Decisions, 437) appeared the statement that there shall be paid into a local land office a fee of $10.00 "for receiving and acting on each application for a permit" such as had been filed by plaintiff. That said letter requested plaintiff to send said amount to the said Register. That on December 19, 1923, said amount was received and accepted by the said Register from plaintiff. That later in December, 1923, or in January, 1924, the said Register paid said sum of $10.00 into the Treasury of the United States. That subsequently said sum was received from the Treasury of the United States by the said Register and was lawfully converted, applied and used by him as his duly earned fee for receiving and acting on plaintiff's said application.

XI. That plaintiff's said application was received in the General Land Office, at Washington, D. C., from the United States Land Office at Baton Rouge, Louisiana, in January,

1924, and on the 24th day of that month the General Land Office acted on said application in connection with
1-b an application for an oil and gas permit for the same land which the defendant Witbeck had filed in the said land office at Baton Rouge, Louisiana, on November 12, 1923, one day after plaintiff, by posting, marking and monumenting the land hereinbefore described, as aforesaid, had acquired a preference right to a permit therefor which was exercisable by him at any time within thirty days from November 11, 1923. That on January 24, 1924, the General Land Office rejected the defendant Witbeck's said application for permit, because it conflicted with plaintiff's application for permit and was junior and subject to the aforesaid preference right of the plaintiff to a permit.

XII. That the defendant Witbeck appealed to the Secretary of the Interior from the judgment of the General Land Office rejecting his application for permit, and the Secretary of the Interior, by his decision rendered the 16th day of April, 1924, (50 Land Decisions, 413) in all things affirmed the judgment of the General Land Office, as aforesaid, and adjudged the defendant Witbeck's said application to be finally rejected and all proceedings in the Department of the Interior with respect thereto to be finally closed.

That said decision by the Secretary of the Interior was officially promulgated by that officer on the 19th day of April, 1924, in a letter from him to the General Land Office commanding the latter (a) to give effect to said decision as a final decision in the matter of the conflict between plaintiff's application and the application of the defendant Witbeck, and (b) to note as finally closed in the Land Department all proceedings with respect to the matter of such conflict. And on the 24th day of April, 1924, the General Land Office, by its letter of that date to the Register and Receiver

of the United States Land Office at Baton Rouge, Louisiana, notified said officers that the application of the defendant Witbeck was finally rejected and directed that those officers note on their records that all proceedings in the case between plaintiff and the defendant Witbeck in the Land Department of the United States had been finally closed therein.

XIII. That plaintiff's said application was also under notice and consideration by the General Land Office and the Secretary of the Interior in proceedings in the Land Department brought by one William R. Berry, a claimant for the land hereinbefore described under an application to purchase same pursuant to the provisions of the Act of Congress of June 3, 1878 (20 Stat., 89) commonly known as the timber and stone law. That on the 15th day of May, 1924, the General Land Office, by its order of that date, ruled the said Berry to show cause why his said application should not be subjected to a reservation to the United States of the oil and gas, if any, in said land. That the said order was occasioned by the pendency in the General Land Office of plaintiff's said application for an oil and gas prospecting permit. That from the aforesaid order the said Berry appealed to the Secretary of the Interior and plaintiff moved for dismissal of the said appeal. That on July 30, 1924, the Secretary of the Interior affirmed the action of the General Land Office in so ruling the said Berry to show cause, and on November 22, 1924, a motion for rehearing filed by the said Berry was denied by the Secretary of the Interior.

XIV. That shortly after rendition of the aforesaid decision of the Secretary of the Interior of April 16, 1924, in and by which that officer finally adjudged in favor of plain-

tiff the conflict between his application for permit and that filed by the defendant Witbeck presented to the
1-c Secretary of the Interior charges of alleged irregularities in the office of the Register and Receiver of the United States Land Office at Baton Ruge, Louisiana, in connection with the application for permit which was filed by him, said charges, in substance, being that the said Register had received the defendant Witbeck's application prior to November 12, 1923, but refused or failed to report and record it as filed prior to that date. That such charges were noticed by the Secretary of the Interior who caused an investigation thereof to be made to determine whether there existed any evidence to justify or sustain or warrant them. That upon completion of such investigation the Secretary of the Interior found and decided that there was no basis whatever in any fact whatever for such charges or any of them. That, however, during the pendency of such charges and the investigation thereof by the Secretary of the Interior, that officer withheld a permit from this plaintiff and after said officer found and declared such charges to be without any foundation in fact and utterly meritless, the defendant Witbeck, notwithstanding that the Secretary of the Interior had finally decided on April 16, 1924, that all proceedings between him and the plaintiff with respect to a permit for the aforesaid land were closed in the Department of the Interior, was allowed by said Department to re-open said proceedings without notice to and without the knowledge of this plaintiff.

XV. That on the 3d day of January, 1925, an attorney at law at Washington, D. C., acting on behalf of the defendant Witbeck, filed in the office of the Secretary of the Interior a paper entitled "a petition for exercise of the Sec-

retary's supervisory authority." The said petition alleged that plaintiffs' application for permit did not appear to have sworn to when it was filed and, therefore, that it was an invalid application because not executed under oath as required by the 4th of the regulations of the Secretary of the Interior under the leasing statute (47 Land Decisions, 437 at 438). That the defendant Witbeck, whose application for permit was filed on November 12, 1923, could not have filed such application with reliance for allowance thereof upon any apparent formal or other defects in the application for permit by plaintiff, for plaintiff's application was not filed until December 11, 1923.

That, however, at all times during the progress of the proceedings before the General Land Office and the Secretary of the Interior that involved (a) the conflict between plaintiff's application for a permit and the said application of the defendant Witbeck, and (b) the application of the said Berry for an entry of the land aforesaid under the provision of the timber and stone law, it was apparent on the face of the papers constituting plaintiff's application for a permit, that the said application did not bear a jurat that evidenced execution of it by your plaintiff under oath. That, notwithstanding, neither the defendant Witbeck, nor the said Berry, nor any officer or employe of the Land Department, nor any person, ever sought to avail of such matter of open and record fact in an endeavor or attempt to cause plaintiff's said application to be rejected by the Land Department, until the filing of such petition for exercise of supervisory authority on January 3, 1925, aforesaid, nine months after rendition by the Secretary of the Interior of his final decision of April 16, 1924, in the matter of the conflict between plaintiff's application and the application of the defendant Witbeck. That presentation of the said petition on behalf of the defendant Witbeck on January 3, 1925, was an asser-

tion, made for the first time before the Land Department, that plaintiff's preference right to a permit should be adjudged forfeit to the behoof of the defendant Witbeck because plaintiff's application appeared not to have been executed under oath when filed.

1-d XVI. That the aforesaid petition on behalf of the defendant Witbeck was supported by written brief filed by his counsel resident in Washington. That, however, without any notice whatever to this plaintiff of the presentation and pendency of such petition and such brief, and without any opportunity whatever for him to be heard in answer to such petition and such brief, the First Assistant Secretary of the Interior, on the 12th day of January, 1925, rendered a decision which that officer chose to say was rendered on "Re-consideration of (defendant Witbeck's) appeal from the General Land Office," an appeal which that officer had finally decided on April 16, 1924, as aforesaid, nine months before January 12, 1925. That, however, the said decision of January 12, 1925, was in fact rendered with respect to matters and things that had not been urged or presented on such appeal. That the truth is that the aforesaid decision of January 12, 1925, was rendered with respect to matters and things which the defendant, Witbeck, proceeding ex parte and through his attorney at Washington, D. C., had brought to the attention of the First Assistant Secretary of the Interior, for the first time, nearly nine months after rendition of the Interior Department's "final" decision of April 16, 1924, aforesaid. And the aforesaid decision of the 12th day of January, 1925, was in fact and truth rendered without due or any process to this plaintiff.

XVII. That in his said decision of the 12th day of January, 1925, the First Assistant Secretary of the Interior decided that the defendant Albert T. Witbeck was "Entitled to priority" over plaintiff as an applicant for a permit to prospect the aforesaid land for oil and gas, and rested such decision upon findings of fact and conclusion of law thereon, as follows, to wit:

Finding A. That paragraph 8 of Circular No. 616 of the Department of the Interior, approved August 9, 1918 (46 L. D. 513 to 617) and described as "the necessary detailed instructions and information relative to records and accounts for the use of all officers and employees of this bureau" (the General Land Office) provides:

"That applications, declarations, etc., which are not accompanied by the proper remittances in form or in amount required by law or regulations to be tendered at the same time they are filed will be assigned current serial numbers "xx" Where no money is tendered, the application, etc., will be rejected."

Conclusion A. That the provisions of said paragraph of said circular "govern" the action of Registers and Receivers on application for permits under section 13 of the leasing statute of February 25, 1920, and, therefore, that plaintiff's "failure to tender the required filing fee within thirty (30) days after the date of the alleged posting defeated his claim of preference right."

Finding B. That plaintiff's application for a permit was not executed under oath; that the fourth (4th) of the regulations under the leasing statute requires that such an application be executed under oath.

Conclusion B. That "when one asserts a preference right to a prospecting permit, it is necessary that he comply literally with all the provisions of the governing regulations which have all the force and effect of law," and therefore, "The Department must hold that Hardeman (plaintiff) did not properly assert his claim of preference right within the time allowed, and that Witbeck's application is entitled to priority."

XVIII. And plaintiff further says that paragraph 8 of the aforesaid Circular 616 approved August 9, 1-e 1918, was wholly unknown to him before notice by him of the aforesaid decision of the First Assistant Secretary of the Interior of January 12, 1925. Said paragraph is one of a set of instructions to officers and employes of the General Land Office as to their official duty with respect to the books of account and the system of accounting of the said office and was never, either by incorporation or by reference made a part of those regulations that were designed and intended for the advice and guidance of applicants for permits under section 13 of the leasing statute. Said paragraph 8, in terms, is applicable only where a fee is "required by law or regulations to be tendered at the same time" an application is filed; and plaintiff says that neither the leasing law nor any regulation thereunder requires the payment of a fee at the time of tendering of an application for permit or any specified time.

That the statement by the Secretary of the Interior in his said decision of the 12th of January, 1925, that the provisions of said paragraph 8 of said Circular No. 616 "govern" with respect to applications for permits under the leasing statute, is inconsistent with and contradictory to, the said officer's own declaration in his regulations under the leasing

statute (47 Land Decisions, 437, at 437) that these regulations, and none other, shall "govern" with respect to applications for permits under that statute. And plaintiff says therefore, (and also because the filling fee which he paid on December 19, 1923, as aforesaid, was paid into the Treasury of the United States and thereafter paid by the Treasury to the Register as the latter's compensation for action upon plaintiff's application for permit), that the aforesaid decision of the Secretary of the Interior of January 12, 1925, was arbitrary in its conclusion that the provisions of paragraph 8 of said Circular No. 616 imposed a legal duty upon the Secretary of the Interior to decide that plaintiff had forfeited his preference right and that the defendant Witbeck had acquired priority over plaintiff as an applicant for permit.

XIX. That by his earlier by expressly "final" decision of April 16, 1924, aforesaid, the Secretary of the Interior adjudged plaintiff to be the first locator of the oil and gas deposits, if any, in the land aforesaid, and has never adjudged otherwise, notwithstanding his said decision of January 12, 1925, and a decision by him of March 5, 1925, which is referred to hereinafter. That said "final" decision of April 16, 1924, adjudged plaintiff's preference right to a permit under section 13 of the leasing statute to be analagous to the right of a person who is the first lawful locator of mineral land under the general mining laws of the United States. That it has never been adjudged by the Department of the Interior, or by any Court, and is not and never has been the law, that the first locator of mineral deposits belonging to the United States forfeits his right and loses his status as such through failure either to have his application for recognition as such by the interior Department bear a jurat in proof that it was executed under oath or to pay a

fee at the time of filing of the application. That it is and always has been the law that a junior locator of such deposits is in no wise affected or benefitted through or by either such failure on the part of the senior locator, and it is and ever has been the law, and the Department of the Interior, except as to your plaintiff's said application for permit, has uniformly so adjudged and decided, that any formal defect in an application by the first lawful locator to be recognized as such by the Interior Department is curable by amendment, nunc pro tunc, and that the payment of a filing fee under such application several days after it has been filed in no wise affects the validity and effectiveness of such application from the date of its filing.

XX. That plaintiff did not know before notice by him of the aforesaid decision of the Secretary of the Interior of January 12, 1925, that his application for permit was without proof that it had been sworn to by him before it had been filed. Said application was in fact sworn to by plaintiff before it was filed, and until he received notice of the said decision of January 12, 1925, he thought and believed that said application bore a jurat as to execution thereof by him under oath before it was filed.

XXI. That within the period prescribed therefor by the Rules of Practice before the Department of the Interior, plaintiff filed a motion for rehearing of the decision rendered by the secretary of the Interior on January 12, 1925, as aforesaid. That also within the said period plaintiff filed in the Department of the Interior his affidavit, to which affidavit there was annexed a true copy of plaintiff's application for permit, the affidavit alleging, inter alia:

"That he (plaintiff) attches hereto an exact copy of said application and declares that the allegations of fact contained in the original as well as in this supplemental or amended application are true and correct."

And also within said period plaintiff formally moved in the Department of the Interior that the just mentioned affidavit and copy of application for permit be received and filed as papers amendatory of plaintiff's application for permit and that said application for permit, as so amended, stand as an effective and valid application from the date of its filing, to wit, December 11, 1923.

XII. That on March 5, 1925, the Secretary of the Interior denied plaintiff's aforesaid motion for rehearing and his motion for amendment of his application for a permit, nunc pro tunc, and adhered to the aforesaid decision of the 12th of January, 1925. That on the 7th day of March, 1925, when neither plaintiff nor his counsel was informed of the action taken by the Secretary of the Interior on the 5th of March, 1925, as aforesaid, there was filed in the office of the Secretary of the Interior plaintiff's affidavit wherein he alleged (1st) that on the 10th day of December, 1923, he, accompanied by his father, T. J. Hardeman, went before the Clerk of the United States District Court, at Shreveport, Louisiana, for the purpose of executing an application for permit by himself and a statement by his father, the said T. J. Hardeman, as to plaintiff's place of birth and his citizenship; (2nd) that on the said date and by said Clerk plaintiff and the said T. J. Hardeman were duly sworn to the application for permit and statement, respectively; (3d) that the application for permit thus sworn to was the application that plaintiff filed in the United States Land Office at

Baton Rouge, Louisiana, on December 11, 1923; (4th) that said Clerk executed a jurat as to the oath to such statement by plaintiff's father but neglected to execute a jurat as to the oath to plaintiff's said application for permit; and (5th) that such neglect or oversight of said Clerk did not come to the notice of plaintiff until subsequent to January 12, 1925.

XXIII. That the decision of the Secretary of the Interior of March 5, 1925, assigned as reasons therefor the said Secretary's conclusions, as follows, to wit:

conclusions, as follows, to wit:

"Not being accompanied by any part of the filing fee, the application (of plaintiff) was without any force and effect,—mere nullity, and not subject to any action, after the lapse of thirty days from the date of the alleged posting of notice, which could preserve the claim of preference right." x x x "the right of amendment (of plaintiff's application for permit) did not extend beyond thirty days after November 11, 1923, the time within which he could pay the fees required by law and regulations, and without which payment his application was of no effect."

And pursuant to the conclusions announced by him in his aforesaid decision of March 5, 1925, and solely because of such conclusions, the Secretary of the Interior, on or about the 6th day of May, 1925, issued to the defendant Witbeck a permit to prospect the land hereinbefore described for oil and gas under and pursuant to section 13 of the "leasing statute." That in issuing such permit to the defendant Witbeck the Secretary of the Interior wrongfully and unlawfully ignored and disregarded the prior and superior right of plaintiff under the leasing statute to such permit.

And plaintiff says that the decisions of the Secretary of the Interior of January 12, 1925, and March 5, 1925, as aforesaid, were not decisions of questions of fact but were decisions on questions of law arising out of admitted and unquestioned facts, and were decisions that were wholly controlled by his consideration of and his opinion on matters of law exclusively. And plaintiff is advised and believes and therefore avers that said decisions were wholly erroneous in matters of law, if not wilfully arbitrary, to the extent they adjudged (a) that plaintiff's application for a permit was "a mere nullity"; (b) that plaintiff had forfeited his preference right to a permit; and (c) that the defendant Witbeck had acquired priority over plaintiff as an application for permit.

That the right of plaintiff to priority over the defendant Witbeck as an applicant for permit for the land aforesaid and to a permit for said land, was and is a right which plaintiff duly and fully acquired and which became vested in him under a law of Congress. That said right is a right of great value in that it is a right to prospect for oil and gas upon land which qualified geologists have determined to be within the geologic structure of an already producing gas field in which, and upon the land hereinbefore described, may be discovered large deposits of oil and gas. That plaintiff and others who have knowledge of the character of the land described estimate the value of the right to prospect for oil and gas thereon to be of value of approximately twenty-five Thousand ($25,000.00) dollars.

That this cause arises solely under the laws of the United States and that the amount in controversy herein exceeds the sum of three thousand ($3,000.00) Dollars, exclusive of interest and costs.

Wherefore, the premises considered, plaintiff respectfully prays that this Honorable Court declare, adjudge, and decree as follows, to wit:

1. That the Secretary of the Interior, in effectuation of an erroneous judgment by him in matters of law relating to plaintiff's preference right to and his application for a permit under section 13 of the leasing statute, awarded and issued to the defendant Witbeck a permit which, under the law, should have been awarded and issued to plaintiff.

2. That plaintiff is the equitable owner of that certain permit to prospect the hereinbefore described lands for oil and gas which was issued to the defendant Albert T. Witbeck on or about the 6th day of May, 1925, by the Secretary of the Interior.

3. That the defendant Albert T. Witbeck, or his assignee, or assignees, if any, holds or hold the legal title to said permit in trust for plaintiff, and that the defendant Albert T. Witbeck, or his assignee, or assignees, if any, has or have no beneficial interest therein.

4. That the defendant Albert T. Witbeck, or his assignee, or assignees, if any, convey, transfer and assign the said permit to plaintiff, or, in default, that a commissioner or trustee appointed by this Honorable Court shall so convey, transfer or assign, or in the alternative.

5. That the defendant Albert T. Witbeck be required to furnish to plaintiff a bond, or other security, satisfactory to this Court, for disposal upon the command and at the direction of plaintiff, but subject to all rights and interests of the United States Government therein, of all oil or gas that may be produced from the lands aforesaid as a consequence of operations thereon by the defendant Albert T. Witbeck, or by any assignees, or assignees, of the said Witbeck, either

under the permit aforesaid or under any lease of said land executed by the Secretary of the Interior because of the production of oil or gas from said land under the permit.

6. That ~~such~~ further and other relief be afforded plaintiff as may be meet and proper in equity, and that plaintiff recover costs.

JACK HARDEMAN,
Plaintiff.
J. M. GRIMMET,
Attorney for Plaintiff,
PATRICK H. LOUGHRAN,
Mills Building,
Washington, D. C.
Of Counsel for Plaintiff.

Parish of Caddo,
State of Louisiana, ss.

Jack Hardeman, being first duly sworn on oath deposes and says:

That he is the plaintiff named in the foregoing bill of complaint that he has read the foregoing bill of complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes them to be true; that he subscribed the said bill of complaint as plaintiff named in said bill.

JACK HARDEMAN.

Filed May 22, 1925.

Subscribed and sworn to before me this 22 day of May, 1925.

J. M. GRIMMET,
Notary Public.

My Commission good during life.
(Seal).

5 MOTION TO DISMISS.

(Title Omitted.)

In the above entitled and numbered cause, comes now the defendant and, without answering the bill of complaint, moves that the same be dismissed, because:

First, of want of equity;

Second, of failure of the plaintiff to state a cause or right of action.

Wherefore, he prays that this motion be sustained and the bill dismissed, with costs.

THIGPEN, HEROLD, LEE & COUSIN.
Solicitors for Defendant.

Filed June 1, 1925.

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6 MOTION TO DISMISS FOR WANT OF JURISDICTION.

(Title Omitted.)

Comes now the defendant, and moves to dismiss the bill of the complaint, for the reasons:

1.

That this Court is without jurisdiction of the subject matter of this suit, because title to the property is in the United States.

2.

That the United States is an indispensable party to this proceeding, and cannot be herein brought without its consent.

Wherefore, he prays that this motion be sustained and the suit dismissed.

THIGPEN, HEROLD, LEE & COUSIN,
Attorneys for Defendant.

Filed Mar. 16, 1927.

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7 ANSWER AND EXHIBITS.

(Title Omitted.)

In the above styled and numbered cause, comes now the defendant, Albert T. Witbeck, and renewing his motion to dismiss the bill of complaint hereinbefore filed and specially insisting upon the same, and with full reservation of all rights under said motion to dismiss, answers the bill of complaint as follows, to wit:

1.

Admitted.

2.

Admitted.

3.

Admitted.

4.

The allegations of Article IV of the bill of complaint as to the nature of the subject matter of the suit and of the value of the beneficial interest under the permit in dispute are admitted; the remainder of the said article is denied.

5.

Denied for lack of information sufficient on which to predicate a positive affirmative or denial.

6.

The allegations of Article VI are admitted, except that it is denied that it is or was the duty of the Secretary of the Interior to issue a permit to prospect on the land in question to anyone, the granting of such permit being discretionary with the Secretary of the Interior in any case.

7.

Admitted. In this connection, respondent pleads the entire statute, a portion of which is pleaded by plaintiff.

8.

With respect to the allegations contained in Articles VIII to XXIII of the bill of complaint, your respondent shows that all of the matters and things with regard to which statements are made in the bill of complaint are
8 matters to be determined from the records of the Interior Department, and that the truth or falsity

of each and all of said allegations will necessarily be determined by the Court from the contents of the said records themselves. For this reason, these particular articles need no answer except the said records themselves, which are made a part hereof as fully as if entirely incorporated herein.

9.

Respondent denies seriatim the conclusions sought to be drawn by the plaintiff, as set out in the bill of complaint, and now pleads the entire record in said cause as a full and complete answer to plaintiff's allegations.

10.

And respondent shows that all of the matters and things with regard to which this suit is brought are matters confided by law to the discretion and judgment of the Secretary of the Interior, and that all of the rulings and decisions complained of were made and taken in the exercise of a function solely involving the judgment and discretion of the Secretary of the Interior under the acts of Congress governing the matter, and that neither this Court nor any other Court is vested with jurisdiction therein.

11.

And now your respondent shows that, under the regulations governing the issuance of oil and gas permits and leases, made and promulgated by the Secretary of the Interior in the exercise of the power vested in him by the governing acts of Congress, it is especially provided as follows:

"That the granting of a prospecting permit for oil and gas is discretionary with the Secretary of the Interior, and any application may be granted or denied, either in part or in its entirety, as the facts may be deemed to warrant."

12.

And respondent shows that the application of the plaintiff was made with knowledge of such regulations and under said regulations, which are binding in the premises.

13.

And now your respondent shows that on the 9th day of March, 1925, the present complainant brought a suit in the Supreme Court of the District of Columbia against your respondent and against Hubert Work, Secretary of the Interior, and William Spry, Commissioner of the General Land Office, the said cause being numbered 43,756 on the equity docket of the said Court, wherein, under identically the same allegations as those presented in the bill of complaint herein, this present complainant prayed for an injunction against the defendants, the Secretary of the Interior and the Commissioner of the General Land Office, and all persons claiming to act under their authority, enjoining them from enforcing any of the rulings, holdings and decisions mentioned and complained of in the said bill of complaint (which are the same rulings, holdings and decisions complained of in the bill of complaint herein filed) and from issuing a permit to Albert T. Witbeck to prospect
9 for oil and gas on the land involved in this suit in pursuance of and because of such rulings, holdings and decisions; that the said bill of complaint prayed that on final hearing said injunction be made perpetual, and that a mandatory injunction issue therein against said defendants commanding and requiring the vacation of each of those certain rulings, holdings and decisions aforesaid, and that

all the rights granted and secured to this plaintiff under Section 13 of the Leasing Statute with respect to the land in question be recognized, respected and given full legal force and effect in the exercise of the legal discretion of the defendant, Secretary of the Interior, excluding from all consideration in connection with such rights those rulings, holdings and decisions referred to in the foregoing bill of complaint."

The said bill further prayed for a decree that the defendant, Wilbert T. Witbeck, is without priority over the plaintiff as an applicant for an oil and gas permit for the land in question for any of the reasons assigned by the Defendant, Secretary of the Interior, in the decisions against which the bill complained; and that it be decreed that all such reasons had been assigned by the Secretary of the Interior in disregard of law and arbitrarily.

And respondent shows that on the 14th day of April, 1925, the said Jack Hardeman, the complainant in this suit and in the suit aforesaid, filed an amended bill of complaint setting out more in detail the facts as alleged in his present bill of complaint.

Respondent shows that on the 5th day of May, 1925, the cause came on to be heard on the motion of the defendants to dismiss the bill of complaint, upon the ground that the decisions and actions of the Secretary of the Interior and the Commissioner of the General Land Office were made and taken in the exercise of a function involving their judgment and discretion in a matter committed by the Act of February 25, 1920, exclusively to that jurisdiction, and that plaintiffs was without any right in the premises giving rise to a ministerial duty on their part, and accordingly formal

decree was entered and signed dismissing the bill of complaint on that date, which said decree is now final.

And respondent, attaching hereto and making part hereof a certified transcript of the record in said cause No. 43,756 the equity docket of the Supreme Court of the District of Columbia, pleads all the matters and things aforesaid in bar of plaintiff's demands.

Wherefore, having made full and complete answer to the complaint of the plaintiff, respondent prays that the demands of the complainant be rejected and his bill dismissed, with costs; and he further prays for all orders necessary and proper in the premises, and for general and equitable relief.

THIGPEN, HEROLD, LEE & COUSIN,
Attorneys for Respondent.

We hereby certify that we have this day mailed a copy of the foregoing answer to J. M. Grimmet, of counsel for plaintiff.

March 22, 1926.

THIGPEN, HEROLD, LEE & COUSIN,

Filed March 22, 1926.

W. B. LEE,
Clerk, U. S. Dist. Court, West. Dist. of Louisiana.

10 In the Supreme Court of the District of Columbia.

Transcript of Record.

To all to whom these presents come, greeting:

United States of America,
District of Columbia, ss.

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, among others, were the following proceedings, to-wit:

Filed March 17, 1927.

11 BILL OF COMPLAINT.

Filed March 9, 1925, Morgan H. Beach, Clerk.

In the Supreme Court of the District of Columbia.

No. 43751 In Equity.

Jack H. Hardeman,

Plaintiff,

vs.

Hubert Work, Secretary of the Interior, William Spry, Commissioner of the General Land Office and Albert T. Witbeck,

Defendants.

To the Supreme Court of the District of Columbia, Holding an Equity Court:

Plaintiff states as follows:

1. The plaintiff, Jack H. Hardeman, is a native citizen of the United States and a resident of Minden, in the County of Webster, State of Louisiana, and brings this suit in his own right.

II. The defendants Hubert Work and William Spry are citizens of the States of Colorado and Utah, respectively, but now actually reside in the District of Columbia.

III. That at the time of the filing of this bill the defendant, Hubert Work, was the Secretary of the Department of the Interior of the United States, and, as such, has charge of the administration of the laws of the United States relating to the public lands and to the deposits of oil and gas therein and also in lands that have been conveyed by the United States subject to a reservation to it of such deposits, if any, one of such laws being the act of Congress of February 25, 1920 (41 Stat. 437) commonly known as the "leasing statute"; and also at said time the defendant, William Spry, was Commissioner of the General Land Office of the United States, the latter being one of the branches of the said Department of the Interior, having immediate charge of the administration of the laws relating to the public lands and to the deposits of oil and gas therein, and also in lands that have been conveyed by the United States subject to a reservation to it of such deposits, if any, one of such laws being the aforesaid act of Congress of February 25, 1920, the said Commissioner acting therein under the direction, supervision and approval of the Secretary of the Interior; and that each of said defendants is sued in his official capacity

as such Secretary of the Interior and the Commissioner of the General Land Office, respectively, as hereinafter set forth.

IV. The defendant, Albert T. Witbeck, is a native citizen of the United States and a resident of the Shreveport, in the County of Caddo, State of Louisiana, and is sued in his own right.

V. That section 13 of the aforesaid act of Congress of February 25, 1920, (said Statute being referred to wherever hereinafter appears the term leasing statute) provides:

12 "That the Secretary of the Interior is hereby authorized, under such necessary and proper rules and regulations as he may prescribe, to grant to an applicant qualified under this act a prosecuting permit" et cetera.

And said section further provides:

"Whether the lands sought in any such application and permit are surveyed or unsurveyed the applicant shall, prior to filing his application for permit, locate such lands in a reasonably compact form and according to surveys if the land be surveyed" x x x "and if he (the "applicant qualified under this act") shall cause to be erected upon the land for which a permit is sought a monument not less than four feet high, at some conspicuous place thereon, and shall post a notice in writing on or near said monument, stating that an application for permit will be made within thirty days after date of posting said notice, the name of the applicant, the date of the notice, and such a general description

of the land to be covered by such permit by reference to courses and distances from such monument and such other natural objects and permanent monuments as will reasonably identify the land, stating the amount thereof in acres, he shall during the period of thirty days following such marking and posting, be entitled to a preference right over others to a permit for the land so identified."

VI. That section 32 of the leasing statute provides:

"That the Secretary of the Interior is authorized to proscribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this act," et cetera.

And Section 33 of the same statute provides:

"That all statements, representations, or reports required by the Secretary of the Interior under this act shall be upon oath, unless otherwise specified by him, and in such form and upon such blanks as the Secretary of the Interior may require."

VII. That Section 38 of the leasing statute provides:

"That, until otherwise provided, the Secretary of the Interior shall be authorized to prescribe fees and commissions to be paid registers and receivers of United States Land offices on account of business transacted under the provisions of this act."

VIII. That on or about March 11, 1920 the then Commissioner of the General Land Office formulated and the then Secretary of the Interior approved regulations under

those provisions of the leasing statute that relates to lands in fact or presumptively containing deposits of oil or gas. Such regulations are contained in a publication of the Department of the Interior known as General Land Office Circular No. 672.

13 IX. That on November 11, 1923 the oil and gas, if any of either, in the North-west quarter (NW¼) of the North-east quarter (NE¼) of Section 25, in Township 21 North of Range 10 West of the Louisiana Meridian in the State of Louisiana were, and ever since have been, and are now, in the ownership of the United States, and the said tract of land was on said date and ever since has been, and is now, surveyed land of the class with respect to which it is competent for the Secretary of the Interior, and the duty of that officer under the law, to issue a permit to prospect for oil and gas pursuant to section 13 of the leasing statute.

X. That on November 11, 1923, this plaintiff, who was then, and he ever since has been and is now, qualified to apply for and receive a permit under section 13 of the leasing statute located, marked, erected a monument and posted a notice upon the tract of land aforesaid, doing so in the manner to the extent and conformably to all the provisions and requirements of section 13 of the leasing statute and all the regulations of the Department of the Interior thereunder, and thereby, and as provided in said section, became "entitled to a preference right over others to a permit for the land so identified" x x "during the period of thirty days following such marking and posting." And within said period of thirty days, to-wit, on December 11, 1923, this plaintiff, in exercise of such preference right and desiring to effectuate the same, filed in the United States Land Office at Baton Rouge, Louisiana, an application for a permit for the aforesaid land under section 13 of the leasing statute.

XI. That plaintiff's said application for a permit satisfied all the express requirements of those provisions of the leasing statute that relate to an application for a permit to prospect for oil and gas pursuant to section 13 of the said statute. Said application was executed over the signature of the plaintiff but was not sworn to by him. It was accompanied with what plaintiff, in good faith, over his signature declared to be a true copy of the notice he had posted upon the aforesaid land on November 11, 1923. That there was a typographical error in the alleged true copy of the posted notice in that the number of the township was omitted from the description of the land as appearing in such alleged true copy. That, however, plaintiff's application embodied a full and accurate description of the land, and was also accompanied with an affidavit by T. J. Hardeman, the father of the plaintiff, averring that the plaintiff was a citizen of the United States by birth therein on July 17, 1888.

Said application alleged: (a) that plaintiff was a citizen of the United States and a resident of Minden, Louisiana: (b) That he had performed all the acts required of performance by section 13 of the leasing statute as conditions procedent to acquirment of a preference right to a permit thereunder; (c) that "I (plaintiff) have two witnesses who can testify to the time of this posting" (meaning the posting done upon the land by plaintiff on November 11, 1923 as one of the acts required of performance as a condition precedent to the acquirement of the preference right to a permit); (d) that his application was filed in exercise of such preference right and to effectuate the same; (e) that the land described in his application was not within the boundaries of the geological structure of a producing oil or gas field; (f) that he had never filed any other application for a similar permit; (g) that he was not interested in any other application for a similar permit; (h) that he had no interest whatever in any

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permit theretofore issued nor in any lease theretofore executed under the leasing statute; (i) that in the prospecting of the land, in event of issue to him of a permit to prospect the same, he would be associated with A. D. Turner, President of The Bank of Webster, Louisiana, and other responsible business men; (j) that L. P. Wren, President of the First National Bank of Minden, Louisiana, and R. H. Miller President of The Bank of Minden, Louisiana, would testify as to plaintiff's reputation and business standing; (k) that all notices of action on or with respect to the application should be sent to the plaintiff at Minden, Louisiana. That every one and all of the statements and representations set out in this plaintiff's aforesaid application for a permit was and were and is and are true; and neither of the defendants nor anyone has ever at any time or in any manner denied, or questioned, or even expressed doubt with respect to, or otherwise challenged the verity of any of such statements or representations.

XII. That plaintiff's aforesaid application in exercise of and in effectuation of his preference right to a permit was in accord and compliance with all the requirements of the regulations of the Department of the Interior pertinent to such application, excepting two requirements of the fourth (4th) of said regulations, to wit, that the application "be under oath" and that it be accompanied "with a true copy of the posted notice," such two requirements being made in the first paragraph and sub-paragraph g respectively, of said 4th regulation at pages 8 and 9 of the aforesaid General Land Office Circular No. 672. That said two requirements are not requirements imposed in the terms of the leasing statute but are, as the plaintiff concedes, valid procedureal requirements that were imposed by the Secretary

of the Interior in pursuance of his authority under Sections 32 and 33 of the leasing statute to prescribe and regulate proceedings thereunder.

XIII. That plaintiff's said application was not verified under oath has never been made a ground of objection thereto by the Register of the United States Land Office at Baton Rouge, Louisiana. The said Register has never rejected the said application upon any ground or for any reason, but, on the contrary he received, entertained, accepted, filed and recorded it on the date it was tendered to said office, to wit, December 11, 1923 and on said date notations were duly made on the tract books and other records of said office to show, and to give notice, that the land aforesaid had been made subject to this plaintiff's said application and preference right to a permit. And such notations were made pursuant to and in agreement with the description of land as set out in this plaintiff's application for permit.

That on the 15th day of December 1923 plaintiff tendered to said office, although not required by any law or regulation to do so at such time, his bond with the Union Indemnity Company, a corporation, as surety, for faithful performance of the terms and obligations of any permit that might be issued to him under his said application and in recognition of his said preference right. That such bond was received, entertained, accepted, filed and recorded on the date it was tendered and was then made a part of what this plaintiff then regarded as a completed and perfected application for a permit to prospect the land aforesaid for oil and gas.

15 XIV. That neither at the time of filing of plaintiff's application for permit, as aforesaid, nor at any time whatever has any provision of the laws relating

to the issue of permits to prospect for oil or gas, or any regulation of the Department of the Interior under such laws, imposed upon any applicant for a permit to prospect for such deposits a requirement that he shall pay a fee at the time of filing of his application or at or with any specified time or period of time.

That on or about the 13th day of December, 1923, the Register of the United States Land Office at Baton Rouge, Louisiana, by letter of that date to this plaintiff (copy thereof being annexed to this bill as exhibit "A" thereto) called this plaintiff's attention to the fact that at page 31 of the aforesaid General Land Office Circular No. 672 appeared the statement that there shall be paid into a local land office a fee of $10.00 "for receiving and acting in each application for a permit" such as had been filed by plaintiff. That said letter requested this plaintiff to send said amount to the author of said letter. That on December 19, 1923, said amount was received and accepted by said Register from this plaintiff. That later in December, 1923, or in January, 1924, the Register paid said sum of $10.00 into the Treasury of the United States. That subsequently said sum was received from the Treasury of the United States by the said Register and was converted, applied and used by him as a part of his lawfully earned and paid salary or compensation as such Register.

XV. That on November 12, 1923, and after this plaintiff had become entitled to a preference right to a permit for the aforesaid land by locating, monumenting, marking and posting the same as aforesaid pursuant to section 13 of the leasing act, the defendant Albert T. Witbeck filed in the United States Land Office, at Baton Rouge, Louisiana, an application for a permit to prospect the same land for oil and gas, such application by the said Witbeck being under oath,

and being accompanied with a fee of $10.00, when filed. That pursuant to the fourth (4th) of the regulations under the leasing statute, as set out in the aforesaid General Land Office Circular No. 672, the application by the defendant Witbeck, immediately upon its receipt in the said United States Land Office, was "suspended for thirty (30) days to enable preference-right claims to be presented before action." And within thirty days from November 12, 1923, to-wit, on December 11, 1923, this plaintiff filed his aforesaid application for permit in exercise and effectuation of his preference right thereto.

XVI. That on April 16, 1924 the First Assistant Secretary of the Interior, in action on an appeal by the defendant Witbeck from a judgment of the Commissioner of the General Land Office rejecting his said application for a permit because of this plaintiff's preference right as aforesaid, affirmed said judgment and declared to be "closed" in the Department of the Interior the "case" between this plaintiff and the defendant Witbeck. In his mandate to the General Land Office under said decision of affirmance the First Assistant Secretary of the Interior declared that said decision was a "final" decision. Thereafter, and without any notice whatever to this plaintiff, counsel for defendant Witbeck resident in the District of Columbia filed a petition in the Department of the Interior in which, for the first time, it was claimed on behalf of defendant Witbeck that this plaintiff's preference right to a permit should be adjudged forfeit because plaintiff's application in exercise and effectuation of such right was not executed under oath. Such petition was in fact rendered with respect to matters
16 and things which the defendant Witbeck, proceeding ex parte and by his Washington counsel, had brought to the attention of the First Assistant Secretary of the Interior for the first time after rendition of decision

under such appeal. Such decision was in fact rendered without any notice or opportunity whatever to this plaintiff to be heard with respect to such entirely new matters and things.

XVII. That in his said decision of the 12th day of January 1925 the First Assistant Secretary of the Interior decided that the defendant Albert T. Witbeck was "entitled to priority" over this plaintiff as an applicant for a permit to prospect the aforesaid land for oil and gas, and rested such decision upon findings of fact and conclusions of law thereon, as follows, to wit:

Finding A. That paragraph 8 of Circular No. 616 of the Department of the Interior, approved August 9, 1918 (46 L. D. 513 to 617) and described as "the necessary detailed instructions and information relative to records and accounts for the use of all officers and employees of this bureau" (the General Land Office) provides:

"That applications, declarations, etc., which are not accompanied by the proper remittances in form or in amount required by law or regulations to be tendered at the same time they are filed will be assigned current serial number" x x "where no money is tendered, the application etc., will be rejected."

Conclusion A. That the provisions of said paragraph of said circular "govern" the action of Registers and Receivers on applications for permits under section 13 of the leasing statute of February 25, 1920, and, therefore, that this plaintiff's "failure to tender the required filing fee within thirty (30) days after the date of the alleged posting defeated his claim of preference right."

Finding B. That plaintiff's application for a permit was not executed under oath; that the fourth (4th) of the regulations under the leasing statute requires that such an application be executed under oath.

Conclusion B. That "when one asserts a preference right to a prospective permit, it is necessary that he comply literally with all the provisions of the governing regulations which have all the force and effect of law" and, therefore, "the Department must hold that Hardeman did not properly assert his claim of preference right within the time allowed, and that Witbeck's application is entitled to priority."

Finding C. That the copy of the notice posted by this plaintiff on the land aforesaid on November 11, 1923 and which he certified to be a true copy, omitted mention of the number of the township wherein such land is situated. That sub-paragraph g of the fourth (4th) of the regulations under the leasing statute requires that "a true copy of the posted notice" be filed by an applicant for permit who asserts a preference right.

Conclusion C. That "when one asserts a preference right to a prospecting permit, it is necessary that he comply literally with all the provisions of the governing regulations, which have all the force and effect of law," and, therefore, "the Department must hold that Hardeman did not properly assert his claim of preference right within the time allowed, and that Witbeck's application is entitled to priority."

17 XVIII. And this plaintiff further says that paragraph 8 of the aforesaid Circular 616 approved August 9, 1918, was wholly unknown to him before notice

by him of the aforesaid decision of the First Assistant Secretary of the Interior of January 12, 1923. Said paragraph is one of a set of instructions to officers and employes of the General Land Office as to their official duty with respect to the books of account and the system of accounting of the said office and never was, either by incorporation or by reference, made a part of those regulations that were designed and intended for the advice and guidance of applicants for permits under section 13 of the leasing statute. Said paragraph 8, in terms, is applicable only where a fee is "required by law or regulations to be tendered at the same time" an application is filed; and plaintiff says that neither the leasing law nor any regulation thereunder requires the payment of a fee at the time of tendering of an application for permit.

And this plaintiff says therefore, (and also because the filing fee which he paid on December 19, 1923, as aforesaid, was paid into the Treasury of the United States and thereafter paid by the Treasury to the Register as the latter's compensation for action upon plaintiff's application for permit), that the aforesaid decision was arbitrary in its conclusion that the provisions of said paragraph of the said circular imposed a legal duty upon the defendant Secretary of the Interior to decide that plaintiff had forfeited his preference right and that the defendant Witbeck had acquired priority over plaintiff as an applicant for permit.

And this plaintiff further says that the obligations of the Secretary of the Interior and the uniform practice of the Department of the Interior with regard to defects in applications under those mining laws of the United States that provide for the development of minerals that are the property of the United States, have been declared by the defend-

ant Secretary of the Interior to be the same obligations that rest upon the Courts of the United States and to be the same practice that is followed in and by those Courts with respect to defects in pleadings. And the defendant Secretary of the Interior expressly so declared in Stock Oil Company, 40 Land Decisions 198, with respect to a defective application for patent under the general mining laws, and has never declared or decided to the contrary, except as he has, but inferentially only, declared or decided to the contrary with reference to this plaintiff's application in exercise and effectuation of his preference right to a permit.

And this plaintiff says that since July 29, 1911, date of the decision in Stock Oil Company, supra, the Department of the Interior, except as to plaintiff's said application for permit has uniformly allowed an application under the mining laws that was not executed under oath at the time it was filed, or that was defectively executed under oath at such time, to be amended and the defect cured nunc pro tunc.

And this plaintiff further says that the defendant Secretary of the Interior, except as to the copy of posted notice that accompanied this plaintiff's application for permit as aforesaid, has uniformly allowed any obvious typographical error in an exhibit to an application or in an application itself, to be amended and the harmless defect cured nunc pro tunc.

And this plaintiff alleges that the aforesaid decision was arbitrary in its conclusion that because of the aforesaid two defects in plaintiff's application he had lost and forfeited his preference right and that the defendant Witbeck had acquired priority over plaintiff as an applicant for permit.

18 XIX. That this plaintiff did not know before notice by him of the aforesaid decision of the defendant Secretary of the Interior of January 12, 1925 that

his application for permit had not been sworn to by him, and that the copy of the posted notice that accompanied such application was in error in that said copy omitted the number of the township of the land aforesaid. And until such time this plaintiff thought and believed that such application had been sworn to by him on the 10th day of December 1923 and that such copy was an exact copy of the posted notice.

XX. That within the period prescribed therefor by the rules of practice before the Department of the Interior, this plaintiff filed a motion for rehearing of the case between him and the defendant Witbeck under the decision rendered therein on January 12, 1925, as aforesaid. There were filed with such motion certain papers, as follows:

(a) Another copy of notice; the exactness of such other copy as a copy of the notice actually so posted by this plaintiff on the land aforesaid on November 11, 1923 being alleged in an affidavit by this plaintiff also filed with said motion.

(b) Two affidavits, one by Allen Johnson, the other by Stephen C. Banks, each alleging that the affiant witnessed the posting of notice on the land aforesaid on November 11, 1923 by this plaintiff and that the copy of notice presented with this plaintiff's motion for rehearing as aforesaid, was a full and true copy of such posted notice.

(c) The original notice posted on the land aforesaid on November 11, 1923, its character as the original being alleged in an affidavit by the plaintiff filed with the said motion, such original notice describing fully and accurately the land referred to and described in this plaintiff's application for permit."

(d) An affidavit by this plaintiff, annexed to a true copy of his application for permit, said affidavit alleging:

"That he (plaintiff) attaches hereto an exact copy of said application and declares that the allegations of fact contained in the original, as well as in this supplemental or amended application are true and correct."

And, as this plaintiff is informed and believes, in oral argument by counsel for this plaintiff before the First Assistant Secretary of the Interior on February 28, 1925, in support of such motion for re-heaering, such counsel duly moved that the affidavits and papers filed with such motion for re-hearing, as aforesaid, be received and filed as papers amendatory of this plaintiff's application for permit and that said application, as so amended, stand as an effective and valid application from the date of its filing, towit, December 11, 1923.

XXI. That on the 7th day of March, 1925, there was filed in the office of the Secretary of the Interior this plaintiff's affidavit wherein he alleged: That on the 10th day of December 1923, his plaintiff, accompanied by his father, T. J. Hardeman, went before the Clerk of the United States District Court, at Shreveport, Louisiana, for the purpose of executing an application for permit by this plaintiff and a statement by the said T. J. Hardeman as to this plaintiff citizenship: that on said date and by said officer this plaintiff and the said T. J. Hardeman were duly sworn to the application and statement, respectively, that were filed in the U. S. Land Office at Baton Rouge, Louisiana,
19 on December 11, 1923, as aforesaid; that said officer executed a jurat as to the oath to such state-

ment but neglected to execute a jurat as to the oath to said application; that such neglect did not come to the notice of this plaintiff until subsequent to January 12, 1925, as aforesaid.

XXII. That on March 5, 1925, the defendant Secretary of the Interior denied the plaintiff's aforesaid motion for rehearing and adhered to the aforesaid decision of the 12th of January, 1925. And the document evidencing denial of the said motion is put forth by the defendant Secretary of the Interior as an expression of judgment induced by consideration of rules of law and not as an expression of a mere preference (referable to discretion only, which is its own rule) for defendant Witbeck over this plaintiff as a permitee to prospect the land as aforesaid for oil and gas.

And the Secretary of the Interior having now finally decided that this plaintiff forfeited his preference right to a permit and that the defendant Witbeck has a "priority" over this plaintiff as an applicant for permit, will issue a permit for the land aforesaid to the defendant Albert T. Witbeck, if not restrained from so doing by the process of this Court. And plaintiff further says that the issue of such permit to the defendant Witbeck would produce irreparable loss, damage, and injury to this plaintiff for which he would not have adequate or any remedy whatever at law and be wholly remedyless in equity.

XXIII. That the issue of a permit to the defendant Witbeck would not vest in him title to any land or any mineral or anything whatsoever now in the ownership of the United States. That, therefore, should the defendant Witbeck receive such permit it would not be competent for any Court having jurisdiction over the land aforesaid or over the person of the said Witbeck to entertain, hear and determine

any suit or proceedings whatever by this plaintiff for the purpose of adjudging or decreeing the said Witbeck to be a trustee of the title to any land or minerals for this plaintiff. That a permitee under section 13 of the leasing statute is obligated to perform certain conditions specifically enumerated in the permit issued to him; that acceptance of such permit causes the permittee to assume a contractual relation to the Secretary of the Interior with respect to the land described in the permit; that a permitee is a means or instrumentality for the prospecting of lands containing oil and gas the title to which is in the United States; that no Court possesses the power by judgment or decree to substitute for a permittee another and different person, or to compel a permittee to assign and transfer his permit, to another, or to hold under such permit as trustee for another. And this is due to the fact that a permittee is in privity with the United States, through the Secretary of the Interior, and is a person who has assumed a contractual obligation to prospect and explore for mineral deposits which, if found, are the property of the United States.

That this plaintiff would render himself liable to prosecution under the Penal Code of the United States should he resist, vi et armis, the taking of possession of the land aforesaid by the defendant Witbeck under a permit that had issued to him.

And this plaintiff could not maintain an action for possession against said Witbeck, if the latter entered into possession under a permit, for this plaintiff would be without right to possession of the land aforesaid for the prospecting of oil or gas otherwise than under a permit to him actually issued by the defendant, Secretary of the Interior. And this plaintiff says that by reason of express provisions of the leasing statute no one can lawfully enter into possession of the land aforesaid for

the prospecting of it for oil or gas otherwise then under a permit.

XXIV. This plaintiff says, therefore, that the res of this suit is not the land aforesaid nor the oil or gas, if any therein, nor any interest or right in either; that no right to or interest in any land or mineral is acquired by the filing of an application for a permit to prospect for oil and gas; that at the time of filing of this suit neither this plaintiff nor the defendant Witbeck, had acquired any right or interest whatever in the land aforesaid or the mineral, if any, therein; that no such right or interest is possible of acquisition by either this plaintiff or the defendant Witbeck until actual issue of a permit to either; that issue of a permit to either would vest in the one to whom issued the exclusive right of possession of the aforesaid land for the prospecting of it for oil and gas, without a remedy in the other for relief in any Court, or otherwise, against errors of law by the defendant Secretary of the Interior in issuing the permit in derogation and virtual destruction of such other's right thereto under the law.

That the res of this suit is a document which the defendant Secretary of the Interior (as his decisions aforesaid admit) is under compulsion of law to execute and to deliver, and which (also as his said decisions admit) he purposes executing and delivering to the defendant Witbeck in pursuance of said Secretary's judgment that Witbeck is entitled thereto under the law. And such document is to be issued in the jurisdiction of this Court and if issued to the said Witbeck would be a wrong to this plaintiff for which he would be remedyless.

And this plaintiff further says that his status under section 13 of the leasing act and his right by virtue of such status, are duly under the protection of this Court, the same

being a Court of equity having jurisdiction to restrain the defendant Secretary of the Interior from enforcing and effectuating decisions by him that rest upon errors in matters of law exclusively and that threaten the virtual destruction of the right of citizen under a statute of the United States. That the statutory right of this plaintiff to priority over the defendant Witbeck as an applicant for permit for the land aforesaid would be virtually destroyed if the defendant Secretary of the Interior is not restrained by this Court from effectuating the holdings and rulings made by him in his decisions aforesaid, and this because of this plaintiff's inability to obtain relief therefrom in any other forum or by any other form of action or suit elsewhere.

Wherefore, the premises considered, the plaintiff prays:

I. That the process of this Court issue directed to the defendants, Hubert Work, Secretary of the Interior, William Spry, Commissioner of the General Land Office, and Albert T. Witbeck, requiring them and each of them, to appear and make answer to the foregoing bill of complaint.

II. That this plaintiff may have substituted service by way of publication against any of the defendants with respect to whom the Marshal may make a return "not to be found in the District of Columbia."

21 III. That, upon the filing of this bill, or at such short day thereafter as shall be fixed by the Court, a preliminary order may issue herein restraining and enjoining, pendente lite, the defendants Secretary of the Interior and Commissioner of the General Land Office, their successors in office, and each ever and all persons claiming to act under their, or either of their, authority, or control,

from enforcing any or either of the certain rulings, holdings, and decisions mentioned and complained of in the foregoing bill of complaint, or from issuing a permit to Albert T. Witbeck to prospect for oil or gas on the land aforesaid in pursuance and because of such holdings, rulings and decisions.

IV. That, upon final hearing, said restraining order and injunction may be made perpetual, and that mandatory injunction may issue against said defendants, commanding and requiring that each of the certain rulings, holdings, and decisions aforesaid be vacated and set aside and that all the rights granted and secured to this plaintiff under section 13 of the leasing statute with respect to the land in question be recognized, respected and given their full legal force and effect in the exercise of the legal discretion of the defendant Secretary of the Interior, excluding from any and all consideration in connection with such rights, those rulings, holdings, and decisions referred to in the foregoing bill of complaint.

V. That, upon final hearing, this Court decree that the defendant Albert T. Witbeck is without priority over this plaintiff as an applicant for an oil and gas permit for the land aforesaid for any of the stated reasons assigned by the defendant Secretary of the Interior in those decisions against which this plaintiff complains by this bill and that all such stated reasons have been assigned by the defendant Secretary of the Interior in disregard of law, and arbitrarily.

VI. That the plaintiff may have all such other and further relief as the nature of its case may demand and require, and as may be agreeable to equity.

JACK H. HARDEMAN,
By PATRICK H. LOUGHRAN,
Attorney in fact, Mills Building, Wash. D. C.,
PATRICK H. LOUGHRAN,
Attorney for Plaintiff,
Mills Building, Washington, D. C.

The defendants to this Bill of Complaint are:

I. Hubert Work, Secretary of the Interior.
II. William Spry, Commissioner of the General Land Office.
III. Albert T. Witbeck, 161 Creswell St., Shreveport, Louisiana.

22 District of Columbia, ss:

Patrick H. Loughran, being first duly sworn on oath, deposes and says:

That he is a resident of the District of Columbia and is an attorney and counsel at law, and a resident of said District, duly admitted to practice in the Supreme Court of the District of Columbia, that he is the attorney for the plaintiff herein; that he has read the foregoing bill of complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief and that as to those matters he believes them to be true.

Deponent further states that he is personally acquainted with the entire record of the case of Witbeck vs. Hardeman in the Department of the Interior; that he is authorized by Jack Hardeman to act as the latter's attorney in fact in making this verification; and that the reason why this verification is made by the deponent and not by the said Jack Hardeman is that the latter, the plaintiff, is not within the District of Columbia.

PATRICK H. LOUGHRAN.

Subscribed and sworn to before me this 9th day of March, 1925.

ADELAIDE SPRECKELINGER.
(Seal) Notary Public. My Comm. expires May 20, 1929.

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23 EXHIBIT "A."

Filed March 9, 1925. Morgan H. Beach, Clerk.

Department of the Interior.
United States Land Office.

Baton Rouge, La.
December 13, 1925.

PRH.

Jack Hardeman,
Minden, La.

Sir:

We are in receipt of your application to prospect for oil and gas with the affidavit as to posting on the land on November 11, and we are herewith enclosing you copy of the regulations concerning Oil and Gas Permit, which shows

on page 26, paragraph 31 the amount of fees required with the filing of an application of this kind, which is $10.00 and this should be sent payable to the Register of the United States Land Office.

Respectfully,
(Signed) GEO. J. REILLY,
Register.

W.
Money Order
Mailed 12/18/23 $10.00
Serial No. 259378

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24 RULE TO SHOW CAUSE.

Filed March 9, 1925. Morgan H. Beach, Clerk.

In the Supreme Court of the District of Columbia.

Jack H. Hardeman,
Plaintiff,
vs.

Hubert Work, Secretary of the Interior, William Spry, Commissioner of the General Land Office, and Albert T. Witbeck,
Defendants.

No. 43756 In Equity.

Upon consideration of the bill of complaint herein, and upon application in that behalf made, it is, by the Court this 9th day of March, 1925, ordered:

That Hubert Work, Secretary of the Interior, and William Spry, Commissioner of the General Land Office, defendant, show cause to this Court, if any they have, on Friday, the 20th day of March, 1925, at 10 o'clock A. M., why preliminary injunction and restraining order should not be issued as prayed in said bill of complaint.

Provided a copy of said bill and of this rule to show cause is served upon each of said defendants on or before the 10th day of March, 1925.

WILLIAM HITZ,
Justice.

A true Copy: Test:

MORGAN H. BEACH, Clerk,
By F. T. ROHRER,
(Seal) Asst. Clerk.

25 **MOTION TO DISMISS.**

Filed Mar. 18, 1925. Morgan H. Beach, Clerk.

In the Supreme Court of the District of Columbia.

Jack H. Hardeman,
v.
Hubert Work, Secretary of the Interior, William Spry, Commissioner of the General Land Office, et al.

Equity No. 43,756.

Come now Hubert Work, Secretary of the Interior, and William Spry, Commissioner of the General Land Office, defendants in the above entitled suit and move to dismiss

the bill of complaint on the ground that, on its face, it fails to exhibit facts entitling the plaintiff to the relief sought or to any relief in equity, in that it clearly appears that the subject matter thereof that the decisions and actions of these defendants were made and taken in the exercise of a function involving their judgment and discretion in a matter committed by the act of February 25, 1920, exclusively to their jurisdiction, and that the action sought to be commanded is not a ministerial duty due and owing to the plaintiff by these defendants under said act.

HUBERT WORK,
Secretary of the Interior,
WILLIAM SPRY,
Commissioner of the General Land Office.

By their attorney:

C. EDWARD WRIGHT,
Attorney.

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26 AMENDED BILL OF COMPLAINT.

Filed Apr. 14, 1925. Morgan H. Beach, Clerk.

In the Supreme Court of the District of Columbia.

Jack Hardeman,

Plaintiff,

v.

Hubert Work, Secretary of the Interior, William Spry, Commissioner of the General Land Office and Albert T. Witbeck,

Defendants.

No. 43756 In Equity.

To the Supreme Court of the District of Columbia, Holding an Equity Court:

Comes now the plaintiff, and with leave of this Honorable Court first had and obtained, files this his amended bill of complaint:

Plaintiff states as follows:

1. The plaintiff, Jack H. Hardeman, is a native citizen of the United States and a resident of Minden, in the County of Webster, State of Louisiana, and brings this suit in his own right.

II. The defendant Hubert Work and William Spry are citizens of the States of Colorado and Utah, respectively, but now actually reside in the District of Columbia.

III. That at the time of the filing of this bill the defendant, Hubert Work, was the Secretary of the Department of the Interior of the United States, and, as such, has charge of the administration of the laws of the United States relating to the public lands and to the deposits of oil and gas therein and also in lands that have been conveyed by the United States subject to a reservation to it of such deposits, if any, one of such laws being the act of Congress of February 25, 1920, (41 Stat. 437), commonly known as the "leasing statute;" and also at said time the defendant, William Spry, was Commissioner of the General Land Office of the United States, the latter being one of the branches of the said Department of the Interior, having immediate charge

of the administration of the laws relating to the public lands and to the deposits of oil and gas therein, and also in lands that have been conveyed by the United States subject to a reservation to it of such deposits, if any, one of such laws being the aforesaid act of Congress of February 25, 1920, the said Commissioner acting therein under the
27 direction, supervision and approval of the Secretary of the Interior; and that each of said defendants is sued in his official capacity as such Secretary of the Interior and the Commissioner of the General Land Office, respectively, as hereinafter set forth.

IV. The defendant Albert T. Witbeck, is a native citizen of the United States and a resident of Shreveport, in the County of Caddo, State of Louisiana, and is sued in his own right.

V. That Section 13 of the aforesaid act of Congress of February 25, 1920, (said statute being referred to wherever hereinafter appears the term leasing statute) provides:

"That the Secretary of the Interior is hereby authorized, under such necessary and proper rules and regulations as he may prescribe, to grant to an applicant qualified under this act a prospecting permit" et cetera.

And said section further provides:

"Whether the lands sought in any such application and permit are surveyed or unsurveyed the applicant shall, prior to filing his application for permit, locate such lands in a reasonably compact form and according to surveys if the land be surveyed" x x x "and if he (the "applicant qualified under this act") shall cause to be erected upon the land for

which a permit is sought a monument not less than four feet high, at some conspicuous place thereon, and shall post a notice in writing on or near said monument, stating that an application for permit will be made within thirty days after date of posting said notice, the name of the applicant, the date of the notice, and such a general description of the land to be covered by such permit by reference to courses and distances from such monument and such other natural objects and permanent monuments as will reasonably identify the land, stating the amount thereof in acres, he shall during the period of thirty days following such marking and posting, be entitled to a preference right over others to a permit for the land so identified."

VI. That section 32 of the leasing statute provides:

"That the Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this act," et cetera.

And Section 33 of the same statute provides:

"That all statements, representations, or reports required by the Secretary of the Interior under this act shall be upon oath, unless otherwise specified by him, and in such form and upon such blanks as the Secretary of the Interior may require."

VII. That Section 38 of the leasing statutes provides:

"That, until otherwise provided, the Secretary of the Interior shall be authorized to prescribe fees and commissions to be paid registers and receivers of United States land office on account of business transacted under the provisions of this act."

28 VIII. That on or about March 11, 1920 the then Commissioner of the General Land Office formulated and the then Secretary of the Interior approved regulations under those provisions of the leasing statute that relates to lands in fact or presumptively containing deposits of oil or gas. Such regulations are contained in a publication of the Department of the Interior known as General Land Office Circular No. 672.

IX. That on November 11, 1923 the oil and gas, if any of either, in the North-west quarter (NW¼) of the North-east quarter (NE¼)of Section 25, in Township 21 North of Range 10 West of the Louisiana Meridian in the State of Louisiana were, and ever since have been, and are now, in the ownership of the United States, and the said tract of land was on said date and ever since has been, and is now, surveyed land of the class with respect to which it is competent for the Secretary of the Interior, and the duty of that officer under the law, to issue a permit to prospect for oil and gas pursuant to section 13 of the leasing statute.

X. That on November 11, 1923, this plaintiff, who was then, and he ever since has been and is now, qualified to apply for and receive a permit under section 13 of the leasing statute, located, marked, erected a monument and posted a notice upon the tract of land aforesaid, doing so in the manner, to the extent and conformably to all the provisions and requirements of Section 13 of the leasing statute and all the regulations of the Department of the Interior thereunder, and within thirty days thereafter, to wit, on December 11, 1923, this plaintiff, in the exercise of his preference right to a permit filed in the United States Land office at Baton Rouge, Louisiana, an application for a permit for the aforesaid land under section 13 of the leasing statute.

XI. That plaintiff's said application satisfied all the requirements of those provisions of the leasing statute that relate to an application for a permit to prospect for oil and gas pursuant to section 13 of said statute. Said application was executed over the signature of the plaintiff and was sworn to by him before it was filed, by a jurat as to that fact was not annexed to the application by the officer who administered the oath. Said application was accompanied with what plaintiff, in good faith, over his signature, declared to be a true copy of the notice he had posted upon the aforesaid land on November 11, 1923. That there was a typographical error in the alleged true copy of the posted notice in that the number of the township was omitted from the description of the land as appearing in such alleged true copy. That, however, plaintiff's application embodied a full and accurate description of the land, and was also accompanied with an affidavit by T. J. Hardeman, the father of the plaintiff, averring that the plaintiff was a citizen of the United States by birth therein on July 17, 1888.

Said application alleged: (a) that plaintiff was a citizen of the United States and a resident of Minden, Louisiana; (b) that he had performed all the acts required of performance by section 13 of the leasing statute as conditions precedent to acquirement of a preference right to a permit thereunder; (c) that "I (plaintiff) have two witnesses who can testify to the time of this posting" (meaning the posting done upon the land by plaintiff on November 11, 1923 as one of the acts required of performance as a condition precedent to the acquirement of the preference right to a permit); (d) that his application was filed in exercise of such preference right and to effectuate the same; (e) that the land described in his application was not within the
29 boundaries of the geological structure of a producing oil or gas field; (f) that he had never filed any

other application for a similar permit; (g) that he was not interested in any other application for a similar permit; (h) that he had no interest whatever in any permit theretofore issued nor in any lease theretofore executed under the leasing statute; (i) that in the prospecting of the land, in event of issue to him of a permit to prospect the same, he would be associated with A. D. Turner, President of the Bank of Webster, Louisiana, and other responsible business men; (j) that L. P. Wren, President of the First National Bank of Minden, Louisiana, and R. H. Miller, President of The Bank of Minden, Louisiana, would testify as to plaintiff's reputation and business standing; (k) that all notices of action on or with respect to the application should be sent to the plaintiff at Minden, Louisiana. That every one and all of the statements and representations set out in this plaintiff's aforesaid application for a permit was and were and is and are true; and neither of the defendants nor anyone has ever at any time or in any manner denied, or questioned, or even expressed doubt with respect to, or otherwise challenged the verity of any of such statements or representations.

XII. That plaintiff's aforesaid application in exercise of and in effectuation of his preference right to a permit was in accord and compliance with all the requirements of the regulations of the Department of the Interior pertinent to such application, excepting two requirements of the fourth (4th) of said regulations, to wit, that the application show that it was executed "under oath" and that it be accompanied "with a true copy of the posted notice," such two requirements being made in the first paragraph and subparagraph g, respectively, of said 4th regulation at pages 8 and 9 of the aforesaid General Land Office Circular No. 672. That said two requirements are not requirements imposed in the terms of the leasing statute but are, as the

plaintiff concedes, valid procedural requirements that were imposed by the Secretary of the Interior in pursuance of his authority under Sections 32 and 33 of the leasing statute to prescribe and regulate proceedings thereunder.

XIII. That plaintiff's said application failed to show that it had been verified under oath has never been made a ground of objection thereto by the Register of the United States Land Office at Baton Rouge, Louisiana. The said Register has never rejected the said application upon any ground or for any reason, but, on the contrary he received, entertained, accepted, filed and recorded it on the date it was tendered to said office, to wit, December 11, 1923, and on said date notations were duly made on the tract books and other records of said office to show that the land aforesaid had become subject to this plaintiff's preference right to a permit. And such notations were made pursuant to the description of land as set out in this plaintiff's application for permit.

That on the 15th day of December 1923, plaintiff tendered to said office, although not required by any law or regulation to do so at such time, his bond with the Union Indemnity Company, a corporation, as surety, for faithful performance of the terms and obligations of any permit that might be issued to him under his said application and in recognition of his said preference right. That such bond was received, entertained, accepted, filed and recorded on the date it was tendered and was then made a part of what this plaintiff then regarded as a completed and perfected application for a permit to prospect the land aforesaid for oil and gas.

XIV. That neither at the time of filing of plaintiff's application for permit, as aforesaid, nor at any time whatever has any provision of the laws relating to the issue of permits

to prospect for oil or gas, or any regulation of the Department of the Interior under such laws, imposed upon any applicant for a permit to prospect for such deposits a requirement that he shall pay a fee at the time of filing of his application or at or within any specified time or period of time.

That on or about the 13th day of December, 1923, the Register of the United States Land Office at Baton Rouge, Louisiana, by letter of that date to this plaintiff (copy thereof being annexed to this bill as exhibit "A" thereto) called this plaintiff's attention to the fact that at page 31 of the aforesaid General Land Office Circular No. 672 appeared the statement that there shall be paid into a local land office a fee of $10.00" for receiving and acting on each application for a permit" such as had been filed by plaintiff. That said letter requested this plaintiff to send said amount to the author of said letter. That on December 19, 1923 said amount was received and accepted by said Register from this plaintiff. That later in December, 1923, or in January, 1924, the Register paid said sum of $10.00 into the Treasury of the United States. That subsequently said sum was received from the Treasury of the United States by the said Register and was converted, applied and used by him as a part of his lawfully earned and paid salary or compensation as such Register.

XV. That on November 12, 1923 and after this plaintiff had become entitled to a preference right to a permit for the aforesaid land by locating, monumenting, marking and posting the same as aforesaid pursuant to section 13 of the leasing act, the defendant Albert T. Witbeck filed in the United States Land Office at Baton Rouge, Louisiana, an application for a permit to prospect the same land for oil and gas, such application by the said Witbeck being under oath, and being accompanied with a fee of $10.00 when filed.

That pursuant to the fourth (4th) of the regulations under the leasing statute, as set out in the aforesaid General Land Office Circular No. 672, the application by the defendant Witbeck, immediately upon its receipt in the said United States Land Office, was "suspended for thirty (30) days to enable preference-right claims to be presented before action." And within thirty days from November 12, 1923, to wit, on December 11, 1923, this plaintiff filed his aforesaid application for permit in exercise and effectuation of his preference right thereto.

XVI. That on April 16, 1924, the First Assistant Secretary of the Interior, in action on an appeal by the defendant Witbeck from a judgment of the Commissioner of the General Land Office rejecting his said application for a permit because of this plaintiff's preference right as aforesaid, affirmed said judgment and declared to be "closed" in the Department of the Interior the "case" between the plaintiff and the defendant Witbeck. In his mandate to the General Land Office under said decision of affirmance the First Assistant Secretary of the Interior declared that said decision was a "Final" decision. Thereafter, and without any notice whatever to this plaintiff, counsel, for defendant Witbeck, resident in the District of Columbia filed a petition
31 in the Department of the Interior in which, for the first time, it was claimed on behalf of defendant Witbeck that this plaintiff's preference right to a permit should be adjudged forfeit because plaintiff's application in exercise and effectuation of such right did not appear to have been executed under oath. Such petition was supported by a written brief filed on behalf of Witbeck by his counsel resident in Washington. In course of consideration of such petition and such brief, all without any notice whatever to this plaintiff, the Department of the Interior, by

telegram to the Register at Baton Rouge, Louisiana, directed that the Register report, by telegram, the date on which this plaintiff paid the filing fee of $10.00. The register reported that payment of such fee was made on December 19, 1923.

Thereafter, and without any notice whatever to this plaintiff and without any opportunity whatever for him to be heard in answer to such petition and such brief, the First Assistant Secretary of the Interior, on the 12th day of January 1925, rendered a decision which he said was rendered on "Reconsideration of (Witbeck's) Appeal from The General Land Office." Such decision was in fact rendered with respect to matters and things that had not been presented on such appeal. Such decision was in fact rendered with respect to matters and things which the defendant Witbeck, proceeding ex parte and by his Washington counsel, had brought to the attention of the First Assistant Secretary of the Interior for the first time after rendition of decision under such appeal. Such decision was in fact rendered without any notice or opportunity whatever to this plaintiff to be heard with respect to such entirely new matters and things.

XVII. That in his said decision of the 12th day of January 1925 the First Assistant Secretary of the Interior decided that the defendant Albert T. Witbeck was "entitled to priority" over this plaintiff as an applicant for a permit to prospect the aforesaid land for oil and gas, and rested such decision upon findings of fact and conclusions of law thereon, as follows, to wit:

Finding A. That paragraph 8 of Circular No. 616 of the Department of the Interior, approved August 9, 1918 (46

L. D. 513 to 617) and described as "the necessary detailed instructions and information relative to records and accounts for the use of all officers and employees of this bureau" (the General Land Office) provides:

"That applications, declarations, etc., which are not accompanied by the proper remittances in form or in amount required by law or regulations to be tendered at the same time they are filed will be assigned current serial numbers" x x "Where no money is tendered, the application, etc., will be rejected."

Conclusion A. That the provisions of said paragraph of said circular "govern" the action of Registers and Receivers on applications for permits under section 13 of the leasing statute of February 25, 1920, and, therefore, that this plaintiff's "failure to tender the required filing fee within
32 thirty (30) days after the date of the alleged posting defeated his claim of preference right."

Finding B. That plaintiff's application for a permit was not executed under oath; that the fourth (4th) of the regulations under the leasing statute requires that such an application be executed under oath.

Conclusion B. That "when one asserts a preference right to a prospecting permit it is necessary that he comply literally with all the provisions of the governing regulations which have all the force and effect of law" and, therefore, "the department must hold that Hardeman did not properly assert his claim of preference right within the time allowed, and that Witbeck's application is entitled to priority."

Finding C. That the copy of the notice posted by this plaintiff on the land aforesaid on November 11, 1923 and which he certified to be a true copy, omitted mention of the

number of the township wherein such land is situated. That sub-paragraph g of the fourth (4th) of the regulations under the leasing statute requires that "a true copy of the posted notice" be filed by an applicant for permit who asserts a preference right.

Conclusion C. That "when one asserts a preference right to a prospecting permit, it is necessary that he comply literally with all the provisions of the governing regulations, which have all the force and effect of law," and, therefore, "the Department must hold that Hardeman did not properly assert his claim of preference right within the time allowed, and that Witbeck's application is entitled to priority."

XVIII. And this plaintiff further says that paragraph 8 of the aforesaid Circular 616 approved August 9, 1918, was wholly unknown to him before notice by him of the aforesaid decision of the First Assistant Secretary of the Interior of January 12, 1923. Said paragraph is one of a set of instructions to officers and employees of the General Land Office as to their official duty with respect to the books of account and the system of accounting of the said office and never was, either by incorporation or by reference, made a part of those regulations that were designed and intended for the advice and guidance of applicants for permits under section 13 of the leasing statute. Said paragrap 8, in terms, is applicable only where a fee is "required by law or regulations to be tendered at the same time" an application is filed; and plaintiff says that neither the leasing law nor any regulation thereunder requires the payment of a fee at the time of tendering of an application for permit.

And this plaintiff says therefore, (and also because the filing fee which he paid on December 19, 1923, as aforesaid, was paid into the Treasury of the United States and thereafter paid by the Treasury to the Register as the latter's compensation for action upon plaintiff's application for permit), that the aforesaid decision was arbitrary in its conclusion that the provisions of said paragraph of the said circular imposed a legal duty upon the defendant Secretary of the Interior to decide that plaintiff had forfeited his preference right and that the defendant Witbeck had
33 acquired priority over plaintiff as an applicant for permit.

And this plaintiff further says that the obligations of the Secretary of the Interior and the uniform practice of the Department of the Interior with regard to defects in applications under those mining laws of the United States that provide for the development of minerals that are the property of the United States, have been declared by the defendant Secretary of the Interior to be the same obligations that rest upon the Courts of the United States and to be the same practice that is followed in and by those Courts with respect to defects in pleadings. And the defendant Secretary of the Interior expressly so declared in Stock Oil Company, 40 Land Decisions 198, with respect to a defective application for patent under the general mining laws, and has never declared or decided to the contrary, except as he has, but inferentially only, declared or decided to the contrary with reference to this plaintiff's application in exercise and effectuation of his preference right to a permit.

And this plaintiff says that since July 29, 1911, date of the decision in Stock Oil Company, supra, the Department of the Interior, except as to plaintiff's said application for per-

mit, has uniformly allowed an application under the mining laws that was not executed under oath at the time it was filed, or that was defectively executed under oath at such time, to be amended and the defect cured nunc pro tunc.

And this plaintiff further says that the defendant Secretary of the Interior, except as to the copy of posted notice that accompanied this plaintiff's application for permit as aforesaid, his uniformly allowed any obvious typographical error in an exhibit to an application, or in an application itself, to be amended and the harmless defect cured nunc pro tunc.

And this plaintiff alleges that the aforesaid decision was arbitrary in its conclusion that he had forfeited his preference right and that the defendant Witbeck had acquired priority as an applicant for permit.

XIX. That this plaintiff did not know before notice by him of the aforesaid decision of the defendant Secretary of the Interior of January 12, 1925 that his application for permit was without proof that it had been sworn to by him, and that a copy of the posted notice that accompanied such application was in error in that said copy omitted the number of the township of the land aforesaid. And until such time this plaintiff thought and believed that said application bore a jurat as to execution thereof by this plaintiff under oath before it was filed and that such copy was an exact copy of the posted notice.

XX. That within the period prescribed therefor by the rules of practice before the Department of the Interior, this plaintiff filed a motion for rehearing of the case between

him and the defendant Witbeck under the decision rendered therein on January 12, 1925, as aforesaid. There were filed with such motion certain papers, as follows:

(a) Another copy of notice; the exactness of such other copy of the notice actually so posted by this plaintiff on the land aforesaid on November 11, 1923 being alleged
34 in an affidavit by this plaintiff also filed with said motion.

(b) Two affidavits, one by Allen Johnson, the other by Stephen G. Banks, each alleging that the affiant witnessed the posting of notice on the land aforesaid on November 11, 1923 by this plaintiff and that the copy of notice presented with this plaintiff's motion for rehearing as aforesaid, was a full and true copy of such posted notice.

(c) The original notice posted on the land aforesaid on November 11, 1923, its character as the original being alleged in an affidavit by the plaintiff filed with the said motion, such original notice describing fully and accurately the land referred to and described in this plaintiff's application for permit.

(d) An affidavit by this plaintiff, annexed to a true copy of his application for permit, said affidavit alleging: "That he (plaintiff) attaches hereto an exact copy of said application and declares that the allegations of fact contained in the original, as well as in this supplemental or amended application are true and correct."

And, as this plaintiff is informed and believes, in oral argument by counsel for this plaintiff before the First Assistant Secretary of the Interior on February 27, 1925, in

support of such motion for re-hearing, such counsel duly moved that the affidavits and papers filed with such motion for rehearing, as aforesaid, be received and filed as papers amendatory, of this plaintiff's application for permit and that said application, as so amended, stand as an effective and valid application from the date of its filing, to wit, December 11, 1923.

XXI. That on the 7th day of March, 1925, there was filed in the office of the Secretary of the Interior this plaintiff's affidavit wherein he alleged: That on the 10th day of December 1923 this plaintiff, accompanied by his father, T. J. Hardeman, went before the Clerk of the United States District Court, at Shreveport, Louisiana, for the purpose of executing an application for permit by this plaintiff and a statement by the said T. J. Hardeman as to this plaintiff's citizenship; that on said date and by said officer this plaintiff and the said T. J. Hardeman were duly sworn to the application and statement, respectively that were filed in the U. S. Land Office at Baton Rouge, Louisiana, on December 11, 1923, as aforesaid; that said officer executed a jurat as to the oath to such statement but neglected to execute a jurat as to the oath to said application; that such neglect did not come to the notice of this plaintiff until subsequent to January 12, 1925, as aforesaid.

XXII. That on 5th day of March 1925 the defendant Secretary of the Interior denied the plaintiff's aforesaid motion for rehearing and adhered to the aforesaid decision of the 12th of January, 1925. And the document evidencing denial of the said motion is put forth by the defendant Secretary of the Interior as an expression of judgment induced by consideration of rules of law and not as an expression of a mere preference (referable to discretion only,

which is its own rule) for defendant Witbeck over
35 this plaintiff as a permittee to prospect the land as aforesaid for oil and gas.

And the Secretary of the Interior having now finally decided that this plaintiff forfeited his preference right to a permit and that the defendant Witbeck has a "priority" over this plaintiff as an applicant for permit, will issue a permit for the land aforesaid to the defendant Albert T. Witbeck, if not restrained from so doing by the process of this Court. And plaintiff further says that the issue of such permit to the defendant Witbeck would produce irreparable loss, damage, and injury to this plaintiff for which he would not have adequate or any remedy whatever at law and be wholly remediless in equity.

XXIII. That the issue of a permit to the defendant Witbeck would not vest in him title to any land or any mineral or anything whatsoever now in the ownership of the United States. That, therefore, should the defendant Witbeck receive such permit it would not be competent for any Court having jurisdiction over the land aforesaid or over the person of the said Witbeck to entertain, hear and determine any suit or proceeding whatever by this plaintiff for the purpose of adjudging or decreeing the said Witbeck to be a trustee of the title to any land or minerals for this plaintiff. That a permittee under section 13 of the leasing statuee is obligated to perform certain conditions specifically enumerated in the permit issued to him; that acceptance of such permit causes the permittee to assume a contractual relation to the Secretary of the Interior with respect to the land described in the permit; that a permittee is a means or instrumentality for the prospecting of lands containing oil and gas the title of which is in the United States; that no Court possesses the power by judgment or decree to substi-

tute for a permittee another and different person, or to compel a permittee to assign and transfer his permit to another, or to hold under such permit as trustee for another. And this is due to the fact that a permittee is in privity with the United States, through the Secretary of the Interior, and is a person who has assumed a contractual obligation to prospect and explore for mineral deposits which, if found, are the property of the United States.

That this plaintiff would render himself liable to prosecution under the Penal Code of the United States should he resist, vi et armis, the taking possession of the land aforesaid by the defendant Witbeck under a permit that had issued to him.

And this plaintiff could not maintain an action for possession against said Witbeck, if the latter entered into possession under a permit, for this plaintiff would be without right to possession of the land aforesaid for the prospecting of oil or gas otherwise than under a permit to him actually issued by the defendant, Secretary of the Interior. And this plaintiff says that by reason of express provisions of the leasing statute no one can lawfully enter into possession of the land aforesaid for the prospecting of it for oil or gas otherwise than under a permit.

XXIV. This plaintiff says, therefore, that the res of this suit is not the land aforesaid nor the oil or gas, if any therein, nor any interest or right in either; that no right to or interest in any land or mineral is acquired by the filing of an application for a permit to prospect for oil and gas; that at the time of filing of this suit neither this plaintiff nor the defendant Witbeck, had acquired any right or interest whatever in the land aforesaid or the mineral, if any, therein; that no such right or interest is possible of acquisition by either this plaintiff or the

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defendant Witbeck until actual issue of a permit to either; that issue of the permit to either would vest in the one to whom issued the exclusive right of possession of the aforesaid land for the prospecting of it for oil and gas, without a remedy in the other for relief in any Court, or otherwise, against errors of law by the defendant Secretary of the Interior in issuing the permit in derogation and virtual destruction of such other's right thereto under the law.

That the res of this suit is a document which the defendant Secretary of the Interior (as to his decisions aforesaid admit) is under compulsion of law to execute and to deliver, and which (also as his said decisions admit) he purposes executing and delivering to the defendant Witbeck in pursuance of said Secretary's judgment that Witbeck is entitled thereto unler the law. And such document is to be issued in the jurisdiction of this Court and if issued to the said Witbeck would be a wrong to this plaintiff for which he would be remediless.

And this plaintiff further says that his status under section 13 of the leasing act and his right by virtue of such status, are duly under the protection of this Court, the same being a court of equity having jurisdiction to restrain the defendant Secretary of the Interior from enforcing and effectuating decisions by him that rest upon errors in matters of law exclusively and that threaten the virtual destruction of the right of a citizen under a statute of the United States. That the statutory right of this plaintiff to priority over the defendant Witbeck as an applicant for permit for the land aforesaid would be virtually destroyed if the defendant Secretary of the Interior is not restrained by this Court from effectuating the holdings and rulings made by him in his decisions aforesaid, and this because of this plaintiff's inability to obtain relief therefrom in any other forum or in or by any other form of action or suit elsewhere.

Wherefore, the premises considered, the plaintiff prays:

I. That the process of this Court issue directed to the defendants, Hubert Work, Secretary of the Interior, William Spry, Commissioner of the General Land Office, and Albert T. Witbeck, requiring them and each of them, to appear and make answer to the foregoing bill of complaint.

II. That this plaintiff may have substituted service by way of publication against any of the defendants with respect to whom the Marshal may make a return "not to be found in the District of Columbia."

III. That, upon the filing of this bill, or at such short day thereafter as shall be fixed by the Court, a preliminary order may issue herein restraining and enjoining, pendente lite, the defendant Secretary of the Interior and Commissioner of the General Land Office, their successors in office, and each, every and all persons claiming to act under their, or either of their, authority, or control, from enforcing any or either of the certain rulings, holdings, and decisions mentioned and complained of in the foregoing bill of complaint, or from issuing a permit to Albert T. Witbeck to prospect for oil or gas on the land aforesaid in pursuance and because of such holdings, rulings and decisions.

37 IV. That, upon final hearing, said restraining order and injunction may be made perpetual, and that mandatory injunction may issue against said defendants, commanding and requiring that each of the certain rulings, holdings, and decisions aforesaid be vacated and set aside and that all the rights granted and secured to this plaintiff under section 13 of the leasing statute with respect to the land in question be recognized, respected and given

their full legal force and effect in the exercise of the legal discretion of the defendant Secretary of the Interior, excluding from any and all consideration in connection with such rights, those rulings, holdings, and decisions referred to in the foregoing bill of complaint.

V. That, upon final hearing, this Court decree that the defendant Albert T. Witbeck is without priority over this plaintiff as an applicant for an oil and gas permit for the land aforesaid for any of the stated reasons assigned by the defendant Secretary of the Interior in those decisions against which this plaintiff complains by this bill and that all such stated reasons have been assigned by the defendant Secretary of the Interior in disregard of law, and arbitrarily.

VI. And that the plaintiff may have all such other and further relief as the nature of its case may demand and require, and as may be agreeable to equity.

JACK H. HARDEMAN,
Minden, La.
P. O. Address.

Patrick H. Loughran,
Mills Building,
Washington, D. C.
Attorney for Plaintiff.

The defendants to this Bill of Complaint are:

I. Hubert Work, Secretary of the Interior.
II. William Spry, Commissioner of the General Land Office.
III. Albert T. Witbeck, 161 Creswell St., Shreveport, Louisiana.

State of Louisiana,
Parish of Caddo, ss:

Before me, the undersigned, a Notary Public in and for the Parish of Caddo, State of Louisiana, personally appeared Jack H. Hardeman who, being by me first duly sworn, on oath, says: That he is the plaintiff named in the foregoing and annexed amended bill of complaint; that he has read the foregoing and annexed amended bill of complaint by him subscribed and knows the contents thereof; that the statements of fact therein made as upon personal knowledge are true, and those made therein upon information and belief he believes to be true.

JACK H. HARDEMAN.

Subscribed and sworn to before me this 11th day of April, 1925.

J. M. GRIMMET,
Notary Public in and for the
Parish of Caddo.
(Seal) My Comm. expires 1926-May.

38 State of Louisiana,
Parish of Caddo, ss.

Before me, the undersigned, a Notary Public in and for the Parish of Caddo, State of Louisiana, personally appeared Jack H. Hardeman, who, being by me first duly sworn, on oath, says: That he is the plaintiff named in the foregoing and annexed amended bill of complaint; that he has read the foregoing and annexed amended bill of complaint by him subscribed and knows the contents thereof; that the state-

ments of fact therein made as upon personal knowledge are true, and those made therein upon information and belief he believes to be true.

JACK H. HARDEMAN.

Subscribed and sworn to before me this 11th day of April, 1925.

J. M. GRIMMET.
Notary Public in and for the Parish of Caddo.
My Comm. expires 1926-May.

(Seal)

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39 EXHIBIT "A".

Department of the Interior
United States Land Office
Baton Rouge, La.

December 13, 1923.

PHR.

Filed Apr. 14, 1925. Morgan H. Beach, Clerk.

Jack Hardeman,
Minden, La.

Sir:

We are in receipt of your application to prospect for oil and gas with the affidavit as to posting on the land on November 11, and we are herewith enclosing you copy of the regulations concerning Oil and Gas Permit, which shows on page 26, paragraph 31 the amount of fees required with

the filing of an application of this kind, which is $10.00 and this should be sent payable to the Register of the United States Land Office.

Respectfully,
(Signed) GEO. J. REILLY,
Register.

W.
Money order
Mailed 12/18/23 ($10.00)
Serial No. 259378.

Indorsed: Leave to file the within amended bill is hereby granted, this 14th day of April, 1925.

JENNINGS BAILEY,
Justice.

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40 DECREE DISMISSING BILL.

Filed May 5, 1925. Morgan H. Beach, Clerk.

In the Supreme Court of the District of Columbia.

Jack H. Hardeman
vs. Equity No. 43,756.
Hubert Work, Secretary of the Interior, et al.

This cause came on to be heard on the motion of defendants to dismiss the bill of complaint herein filed and was argued by counsel; whereupon, on consideration thereof, the Court having been fully advised in the premises, it is, this 5th day of May, 1925,

Ordered that the motion to dismiss be and the same hereby is sustained; and the plaintiff electing to stand upon said bill of complaint, it is further, on the day last above written,

Ordered, adjudged and decreed that the rule to show cause herein issued be, and the same is hereby, discharged, that the bill of complaint be and the same is hereby dismissed, for want of jurisdiction and that the defendants have judgment for their costs to be taxed by the clerk.

By the Court:
WILLIAM HITZ,
Justice.

And now from the foregoing decree on the day last above written, the plaintiff in open Court prays an appeal to the Court of Appeals of the District of Columbia, and the same is hereby allowed; and the penal sum of the bond for costs on appeal is hereby fixed at $100, with leave to deposit $50, in lieu thereof, with the Clerk of the Court.

By the Court:
W. H.
Justice.

41 AUTHENTICATION OF RECORD.

Supreme Court of the District of Columbia:

I, Morgan H. Beach, Clerk of the said Court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and

that said originals, together, constitute the record of the proceedings of said Court in this cause.

Witness my hand and the seal of said Court, this 27th day of May, 1925.

MORGAN H. BEACH
Clerk.

By .....
Ass't Clerk.

(Seal)
E. W.

I, Walter I. McCoy, Chief Justice of said Court, do hereby certify the foregoing attestation of Morgan H. Beach, Clerk of said Court, to be in due form.

Witness my hand and seal this 27th day of May, 1925.

WALTER I. CcCOY,
Chief Justice.

(Seal)

I, Morgan H. Beach, Clerk of said Court, hereby certify that the Honorable Walter I. McCoy, whose genuine signature is subscribed to the foregoing certificate, was at the time of signing and attesting the same, Chief Justice of said Court, duly commissioned and qualified.

Witness my hand and the seal of said Court, this May 27th, 1925.

MORGAN H. BEACH
Clerk.

By .....
Ass't Clerk.

(Seal)
E. W.

Filed Mar. 22, 1926. W. B. Lee, Clerk, U. S. Dist. Court, West. Dist. of Louisiana.

In the District Court of the United States for the Western District of Louisiana, Shreveport Division.

Jack Hardeman, Complainant,
vs.
Albert T. Witbeck, Respondent.

No. 227, In Equity.

J. M. Grimmet, Shreveport, Louisiana. Attorney for Complainant.

Thigpen, Herold, Lee & Cousins, Shreveport, Louisiana, Attorneys for Respondent.

DAWKINS, J.:

The above numbered and entitled cause having been submitted upon a motion to dismiss for want of equity and for failure to state a cause of action, and the same having been fully considered, and the Court being of the opinion that the same is not well founded, said motion is accordingly overruled.

Done and signed at Monroe, Louisiana, this the 9th day of March, A. D. 1926.

BEN C. DAWKINS,
U. S. D. J.

Filed Mar. 11, 1926.

43 NARRATIVE STATEMENT OF EVIDENCE, ORAL AND DOCUMENTARY, FOR INCLUSION IN TRANSCRIPT OF APPEAL.

1.

This case came on for hearing before the Honorable Ben C. Dawkins, Judge of said Court, at Shreveport, on March 17, 1927, both plaintiff and defendant being in Court and there represented by counsel.

Whereupon, after both parties had announced ready for trial, counsel for plaintiff first offered in evidence the complete record in the case of William R. Berry, Timber and Stone, Baton Rouge Serial No. 010375.

It is shown by these documents that William R. Berry entered the land in controversy under the Timber and Stone Act (20 Stat. 89) on August 1, 1923, and that a patent was issued to him under his said entry on January 22, 1926, subject to the provisions of the Act of July 17, 1914 (38 Stat. 509), reserving to the United States all the phosphate, nitrate, potash, oil, gas or asphaltic mineral deposits in the land embraced in said patent, pursuant to the provisions, conditions, limitations and reservations of the said Act of July 17, 1914.

It is further shown by said documents that the said Berry claimed to be entitled to a patent under his said entry without a reservation of oil and gas to the United States, and that such claim was opposed by the plaintiff under the latter's application for a prospecting permit; that in a proceeding in the Department of the Interior under the title:

"William R. Berry, Claimant for a Prospecting
44 Permit under the Timber and Stone Statute, v. Jack Hardeman, Claimant for a Prospecting Permit under the Leasing Statute," the General Land Office,

on May 15, 1924, rejected said Berry's claim for an unrestricted patent; that said Berry appealed from that action to the Secretary of the Interior, who affirmed and concurred in the action on July 30, 1924; that Berry filed a motion for rehearing; that such motion was denied by the Secretary of the Interior on November 22, 1924; that thereafter the said Berry consented to such reservation, with the result that a patent issued to him under his timber and stone entry, as aforesaid.

2.

Counsel for plaintiff then offered in evidence the entire record in the matter of Jack Hardeman, Baton Rouge Serial No. 010425, which was filed in evidence as P-2.

The papers in this record show the following:

On December 10, 1923, Jack Hardeman, plaintiff in this case, executed and made affidavit to an application for a permit to drill for oil or gas on the property involved in this suit. This application bear the indorsement "Received United States Land Office, Baton Rouge, Louisiana, December 11, 1923, 3 p. m." Said application is in words and figures as follows, to-wit:

"8806

"Minden Louisiana, December 10, 1923.

"To the Honorable Commissioner of the General Land Office of the United States, Washington, D. C. through the United States Land Office at Baton Rouge, Louisiana.

"Sir:

"I Jack Hardeman, a native born citizen of the United States, as shown by the affidavit hereto attached, of Minden, Louisiana, Webster Parish, do hereby apply, in compliance with notice heretofore posted, for the right and permission to drill for oil and gas on the following hereinafter described land.

"I am not a holder of, nor have I any direct or indirect interest in any other subsisting permit, and I have no other application pending for permit.

45 "The land for which permit to drill on is hereby applied for is situated in Webster Parish, Louisiana, and more particularly described as follows, towit:

"The Northwest Quarter of the Northeast Quarter (NW¼ of NE¼) of Section Twenty-five (S 25), Township Twenty-one (21) North, Range Ten (10) West, Louisiana Meridian, containing forty (40) acres, more or less,

"which land I have posted in accordance with regulations governing preference rights, and which land I located by accurate survey.

"The land hereinabove described is not within any known geological structure. There is, however, a known structure, the edge of which is more than a mile distant from this land. I feel, however, in spite of the fact the geologists marked this land outside of the structure, that it might produce oil or gas.

"I propose drilling this land in accordance with approved methods of exploration. I have ample financial backing. I will have associated with me Mr. A. D. Turner, president of the Bank of Webster, of Minden, Louisiana, and other responsible business men.

"Drilling will be prosecuted with due diligence. We will contract the well to be drilled with a reliable drilling concern, one that is experienced in the field near this land. I am not experienced in drilling for oil, but will have the benefiit of the experience of others successful in oil operations.

"I have served as civil engineer for one of the largest operators in the Haynesville Field, and have gained considerable knowledge in that way of oil producing.

"For reference as to my reputation and business standing, I refer you to L. P. Wren, President of the First National Bank of Minden, Louisiana, and to R. H. Miller, President of the Bank of Minden, Minden, Louisiana.

"I hereby claim preference right to this permit by reason of the fact that on November 11, 1923, I located the land herein mentioned, and erected in the center thereof a monument more than four feet high, on which I posted the notice of my intention to apply for this permit, a copy of which is hereby attached.

"I have witnesses who can testify to the time of this posting.

"A bond is being mailed today by the agent of the surety company that executed it.

"Kindly send any notices to me at Minden, Louisiana.

"Respectfully,

"Jack Hardeman."

The said papers also show that on January 16, 1924, the General Land Office addressed a communication to the Geological Survey requesting a report by the Survey "in connection with the application for permit to prospect
46 for oil and gas filed by Jack Hardeman, December 11, 1923; "that thereafter, and in response to such communication, the said Survey reported to the General Land Office that in its opinion the land so applied for by Jack Hardeman should be prospected for oil and gas.

The said papers further show that on January 24, 1924, William Spry, Commissioner of the General Land Office, rendered a decision rejecting the applications which had been filed by Albert T. Witbeck and J. R. Parton, Baton Rouge Serial Nos. 010415 and 010417, respectively, and entertaining the aforesaid application for permit filed by the plaintiff.

That in his aforesaid decision the Commissioner of the General Land Office said and held, inter alia:

"Accordingly you will advise applicants Witbeck and Parton that they will be allowed fifteen days from receipt of notice hereof within which to show cause why their applications 010415 and 010417 should not be rejected because of Hardeman's alleged prior right by posting of notice or to appeal herefrom, and that in default, their applications 010415 and 010417 will be finally rejected and the cases closed without further notice to them from this office."

3.

Counsel for plaintiff then offered in evidence the record in the case of Albert T. Witbeck, Baton Rouge Serial No. 010415, which was filed in evidence as P-3. That record discloses the following:

On November 8, 1923, defendant Witbeck made his application for oil and gas prospecting permit, which was sworn to on November 9, 1923, and bears the indorsement that it was received at the United States Land Office at Baton Rouge, Louisiana, on November 12, 1923, at 3:30 p. m., together with $10.00 on account of fees. That application is in words and figures as follows:

Albert T. Witbeck
1610 Creswell Street
Shreveport, La.

8894
Received
U. S. Land Office
Baton Rouge, La.
Date 11/12/23
Hour 3: 30 P. M.

47

November 8th, 1923.
Serial 010415
No. 2759597 $10.00.

"The Commissioner
General Land Office,
Through District Land Office,
Baton Rouge, La.
"Sir:

I hereby make application for permit to prospect for oil or gas under Act of Congress approved Feb. 25 1920, covering the NW¼ of NE¼ Section 25 Twp 21 R 10 W. Webster Parish, La.

"In accordance with the rules promulgated by the General Land Office and published in Circular 672, I hereby swear that my full name is Albert Tyler Witbeck, living at 1610 Creswell Street, Shreveport, La., that I am not the holder of any permit under existing law in the State of Louisiana, nor am I interested therein with any other person, association or corporation.

"To the best of my knowledge and belief the land applied for, said land being described as follows: Northwest Quarter (NW¼) of Northeast Quarter (NE¼) of Section 25 T. 21 N. R. 10 West, Webster Parish, La., and is not within any known geological structure of a producing oil or gas field.

"I hereby swear that I am a native-born citizen of the United States, having been born in Lansingburg, N. Y. on September 12, 1861, of native born parents, and that at no time since above date have I made application for citizenship, or have become a citizen of any foreign country, and further that I am a veteran of the war with Germany, having served as Captain of Engineers from July 30th, 1917 to Feb. 20, 1919, and having been honorably discharged on the latter date per S. O. No. 43 Par. 6, Office of Chief of Engineers, U. S. A.

"I refer to the three undersigned parties as required on Sec. (f) of Section 4 of the rules.

"Frank J. Silsbee, 910 Merchants Building, Shreveport, La.

W. L. Young, V. P. 1st National Bank, Shreveport, La.

J. L. Henry, State Department of Conservation, Shreveport, La.

"Bond will be made as required in Section (h) of Article 4, when notified that permit will be granted.

"Yours truly,

(Signed) "A. T. WITBECK,

A. T. WITBECK.

"Sworn to and subscribed before me the undersigned authority, this 9th day of November, 1923.

(Signed) "THOMAS J. CREEGAN,

Dep. Clerk and Ex-Officio Notary Public.

"Money order for $10.00 enclosed to cover fees.

"Posted 12/29/23, Vol. 19, page 131, M. M. S. D. "O."

On January 24, 1924, as aforesaid, the Commissioner of the General Land Office held, subject to the right
48 of appeal, that Witbeck's application should be rejected on account of conflict with Hardeman's application.

On February 6, 1924, Witbeck appealed from this decision, which was however affirmed by the Secretary of the Interior on April 16, 1924, by that officer's decision of said date, in words and figures as follows:

"This is an appeal by Albert T. Witbeck from the decision of the Commissioner of the General Land Office dated January 24, 1924, which rejected his application, filed, as disclosed by the records, on November 12, 1923, for a permit

to prospect for oil and gas, pursuant to section 13 of the leasing act of February 25, 1920 (41 Stat., 457), upon the NW.¼ NE.¼, Sec. 25, T. 21 N., R. 10 W., Baton Rouge, Louisiana, land district. The Commissioner found that a prior claim to a permit had been initiated, pursuant to section 13 of the leasing act, by Jack Hardeman, who, on November 11, 1923, posted notice of intention to make application for a prospecting permit, and, on December 11, 1923, within 30 days following such posting, filed application for a prospecting permit for the land involved.

"Two claims are made by this appellant in support of his appeal: First, that the provision for a preference by one who posts notice, in section 13 of the leasing act, was only intended to apply to unsurveyed lands, incapable of definite description or location upon maps or plats, and cannot be held to vest a preference in a person who posts notice upon surveyed land; and second, that his application was in fact received in the local land office on November 10, 1923, but was allowed to remain unnoted in said office until November 12, 1923. He also claims such preferences as are accorded veterans of the war with Germany.

Appellant cites, in support of his claim that the notice referred to in section 13 of the leasing act relates only to unsurveyed lands, the following language in said statute:

"Whether the lands sought in any such application and permit are surveyed or unsurveyed the applicant shall, prior to filing his application for permit, locate such lands in a reasonably compact form and according to the legal subdivisions of the public land surveys if the land be surveyed; and in an approximately square or rectangular tract if the land be an unsurveyed tract, the length of which shall not exceed two and one-half times its width, and if he shall

cause to be erected upon the land for which a permit is sought a monument not less than four feet high, at some conspicuous place thereon, and shall post a notice in writing on or near said monument, stating that an application for permit will be made within thirty days after date of posting said notice, the name of the applicant, the date of the notice, and such a general description of the land to be covered by such permit by reference to courses and distances from such monument and such other natural objects and permanent monuments as will reasonably
49 identify the land, stating the amount thereof in acres, he shall during the period of thirty days following such marking and posting, be entitled to a preference right over others to a permit for the land so identified."

"He claims that the provision for a preference is restricted by these terms to unsurveyed lands which must be identified by metes and bounds description with reference to natural objects.

"Such view is not warranted by the terms of the statute, which provides that the preference may be acquired if the applicant shall cause a monument to be erected 'upon the land for which a permit is sought.' There is no express limitation of this preference to notices on unsurveyed land. The particularity of description prescribed was made necessary for the accomplishment of the purposes of the notice, namely, to appraise all persons who should read such notice of the extent of the area applied for. Such particularity was evidently considered by the Congress as an adequate substitute for the requirement theretofore customarily made of locators of mineral claims that the corners of their claims be marked on the ground. Obviously a provision would have been inadequate which made sufficient a mere description by legal subdivisions of surveyed lands, whether the survey

mouments were or were not then visible on the ground. It is equally clear that public land survey monuments actually on the ground were within the expression 'permanent monuments' used in section 13 of said leasing act, as distinguished from 'natural objects' referred to therein.

"The purpose of section 13 of the leasing act was to grant permits to prospectors for oil and gas; and the preference by notice provision was clearly carried over into the leasing act from the provisions of the placer mining laws under which it has ever been the custom to give priorities to the first person who 'locates' mineral lands in the field, and erected appropriate notices of his claim. No reason appears for the restriction of this preference under the leasing act to the prospector who observed a favorable site for prospecting operations upon unsurveyed land, and a denial of a like preference to another prospector merely because the land chances to be surveyed. See Wagner v. Coffin et al. (40 L. D. 655).

"In this case, it seems clear that Hardeman posted notice upon the land on November 10, 1923, and marked the corners thereof by blazing certain trees, which fact was stated in his notice. The Congress has not given to war veterans any preference in connection with permits and leases under the Act of February 25, 1920, supra; and there remains only appellant's allegation of priority of initiation of a claim to a permit over Hardeman to be considered.

"Appellant claims to be able to prove at a hearing, and has submitted certain affidavits in corroboration thereof, the following facts:

"That, on November 9, 1923, between the hour of 10 and 11 a. m., he purchased, at the Shreveport, La., post office, a money order for the filing fee on his permit application; that he deposited his application in the Shreveport post

office at about 10:20 a. m.; that there was no congestion in the mails on that date; that, under the practice of the post office, a letter mailed at 10:20 a. m. would, on
50 November 9, 1923, have left Shreveport at 4:15 p. m. of the same day; that the train carrying this mail was not delayed on that date but arrived in Baton Rouge at about 4:20 a. m., November 10, 1923; that the mail so transported was delivered to the Baton Rouge post office shortly after the arrival of said train, and that said mail was delivered on that morning (November 10, 1923) shortly before 9 a. m., the opening hour of the land office.

"From these facts appellant claims that it must be found the letter was, in fact, delivered to the local officers on the morning of November 10, 1923, but; through oversight or neglect, was not opened until November 12, 1923. In this connection, he points out that November 10, 1923, was Saturday, a legal half holiday, and deduces that the mail for that day was allowed to go over until Monday.

"If it be assumed that appellant has established all of the facts alleged, he has not shown, prima facie, that his application reached the local land office in advance of the posting by Hardeman. His conclusion that the letter containing his application was delivered to the local office on November 10, 1923, is based upon an assumption, wholly unsupported by the evidence, that the letter left the Shreveport office in due course, that it was duly delivered at the Baton Rouge post office, and that it was, in fact, in the mail delivered from that post office during the working day of November 10, 1923. There is in this situation no statutory presumption of notice or delivery of a letter sent in due course, such as obtains in certain cases involving mere notices to individuals; and the Department is not prepared to assume, on the evidence before it, that whatever default or delay in the matter occurred was occasioned by its agents.

"In view of the fact that the application is noted as received at 3:30 p. m., of November 12, 1923, the Department is convinced that said application was not delivered until some time during that day, and that it was then duly received and assigned a serial number, in accordance with the practice long prevailing, and stated in the cases of William C. Young (2 L. D., 326), Lewis v. Morris (27 L. D., 113), Barnes v. Smith (13 L. D., 582), Heter v. Lindley (35 L. D., 409), and Bumpers v. Holloway (48 L. D., 269).

"The Department finds no merit in appellants' claims, and the Commissioner's decision is affirmed, and the case is closed."

That on April 24, 1924, the General Land Office promulgated and rendered effective the aforesaid decision of the Secretary of the Interior of April 16, 1924, by a letter from the said office to the Register of the United States land office at Baton Rouge, Louisiana, wherein it was said, inter alia:

"* * * You are advised that the decision of the Department, the date of which is noted in the caption thereof, has become final. * * * You will note on your records that the case is hereby closed. The application (meaning the Witbeck application) is finally rejected."

51 On May 24, 1924, defendant Witbeck wrote the following letter to the Secretary of the Interior:

"Albert T. Witbeck 8876 5298
1610 Greswell Street, A-5
Shreveport, La.

Interior Dept. Received May 28, 1924 Office of the Sceretary.

Dept. of the Interior. Received May 28, 1924.

To Genl. Land Office Secy's Off.-Appts., Mails & Files.

May 24, 1924.

Personal.

Dr. Hubert Work,
Secretary of the Interior,
Washington, D. C.

Sir:

"The writer, a disabled veteran respectfully requests that you initiate an investigation of conditions in the Baton Rouge District Land Office for the following reasons:

"1. On November 9th I executed in good faith application for gas and oil permit on certain land in Webster Parish, La., owned by the government, which application was given the number of Baton Rouge 010415. (See this file in your office for data in connection therewith). This application reached Baton Rouge on November 10th and was not filed until November 12th. The stamp on my application, so I am informed is dated November 12, 1923 3:30 P. M. The register wrote me unsolicited that they were very careful in the office as to time of stamping applications, and that my application was stamped at 9 A. M. November 12th.

"An investigation pursued by me seems to have developed the following. The application was received at or about 9 A. M. November 10th 1923. Shortly after that time some one in the registers office or a certain lawyer in Baton Rouge who seems to be closely connected with the land office there, either telephoned or telegraphed to some parties in Minden, La. (possibly the appellee Hardeman, or some one for him) and gave them complete instructions how to post said tract and how to file an application under said posting under Section 13, and stating that an application had been

filed for permit upon said tract. Thereupon Hardeman filed application under date delayed so as to reach the District Land Office on December 11, exactly, claiming to have posted the land on November 11th at 10:25 A. M. (according to his application) and at 3:25 P. M. according to another statement emanating from the Land Office. As a matter of fact, no stake or blazes were seen by the writer on November 20th when he again visited the tract, and they probably would have been seen if there at that time. I understand that Appellee Hardeman states that he can prove posting by two witnesses but does not mention their names.

"This is but one of a number of cases where more or less rumor has been attached to the local office at Baton Rouge, in fact by some is thought to be more than rumor, when persistent reports appear that something is wrong or that 'there is a nigger in the woodpile' somewheres in connection therewith. As a matter of fact it has been more or less common talk around Shreveport that certain parties or someone for them are notified from Baton Rouge immediately upon receipt for any permit in this territory.

"I am acting in perfect good faith in this matter

52 and am

(Dr. Work p. 2 May 24, 1924. 8877 5298 A-6

taking this up with you first in order to keep down any notoriety or scandal in connection with the department regarding the local office, but am frank to say that after a reasonable time has elapsed and no investigation develpos, I intend to have the matter taken up on the floor of the Senate by friends of mine, whom I feel certain will investigate it.

"I have been unable to determine (not having access to the records of the telephone or telegraph company) just who advised the Minden parties of the filing, but it must have

been someone in the local office inasmuch as they held up filing the application until after time enough was given to post notice on the land. Further than this, appellee Hardeman was notified by the local office of Mr. Finney's decision several days prior to the date that I was, I having been informed by friends of mine that he had received notice of decision being rendered more than two days before I received copy of decision from Baton Rouge, which decision was posted there on the previous day to receipt of same by me, showing that same had been delivered promptly.

"Should you decide to investigate this matter, and so advise me, I will be glad to give any assistance possible and information in my possession to your investigator.

"For your information, the writer is a Republican, has been all his life, in New York State & Pennsylvania, was a personal friend of the late Boies Penrose, holds no animosity or enmity towards any one in the local land office, does not expect or desire and will not accept any favors on account of political affiliations; is probably known to some of your under officials, as he was Intelligence Officer at the Gas Experiment Station at American University part of the time when it was under Dr. Manning of the Bureau of Mines, and is or was probably more or less disliked by those who knew that he recommended that it be taken over by the War Department which it eventually was. Further than this, I have been post commander of the largest post of the Legion in Louisiana, and also Department Americanism Chairman. This latter information is given solely to show what my comrades thought of me after the war.

"Thanking you for your attention to this letter, I am

"Yours very truly,

(Signed) "ALBERT T. WITBECK.

ALBERT T. WITBECK.

"Late Capt. of Engrs. A. E. F."

"ATW/MB

On June 3, 1924, the Secretary answered the said letter as follows:

"8874

"The Secretary of the Interior
Washington

Jun-3, 1924.
Received June 5, 1924 G. L. O.

"Mr. Albert T. Witbeck,
1610 Creswell Street,
Shreveport, Louisiana.

53 "My Dear Mr. Witbeck:

"Reference is had to your letter of May 24, 1924, relative to your oil and gas application filed in the Baton Rouge land office, serial No. 010415.

"It appears that your application was rejected by the Commissioner of the General Land Office on January 24, 1924, because of the priority as shown by the records of the rights to the land initiated by Jack Hardeman by posting on November 11, 1923. Upon your appeal and other papers filed thereafter, in which you made certain allegations similar to those contained in your letter, the Department by decision of April 16, 1924, affirmed the action taken by the Commissioner, and by the Commissioner's letter of April 24, 1924, the case was closed.

"Your statements as to the action by the Register or employees of the land office at Baton Rouge are of a serious nature, and if found to be true would demand immediate action by this Department. It appears, however, that such statements should be substantiated in some manner, possibly by your own affidavit and by others if they have knowledge

thereof. These affidavits should cover the alleged improper action of the local land officers and the matter of the non-posting on the land of the claim by Jack Hardeman. Upon receipt of such evidence, the matter will be given careful consideration and such action taken as the facts then may warrant.

"Sincerely yours,
(Signed) HUBERT WORK,
"Secretary.

"5-31-FJ.

On June 8, 1924, Witbeck again wrote the Secretary of the Interior as follows:

"8870 5375 A-1
Dept. of the Interior. Received Jun 12 1924.

Dept. of the Interior. Prepare Reply for Secy's Signature
Jun 12 1924 Secy's Off., Appts., Mails & Files.

"Albert T. Witbeck
1610 Creswell Street
Shreveport, La.

"June 8, 1924.

"The Secretary of the Interior,
Washington, D. C.

My dear Col. Work:

"Your letter of the 3rd inst. received and contents carefully noted.

"My letter of the 24th ult was written to you after a conversation with Mr. J. Y. Snyder, one of the most prominent independent operators in this territory, and incidentally the discoverer of the Elm Grove; Homer and Haynesville fields and one of the largest owners in the Cotton Valley

field, which my application for permit almost immediately adjoins. Mr. Snyder is absolutely honest in all of his dealings, is one of the best liked men in this country and never makes a statement without due consideration. I showed him my file on this application, and after reading "it he stated that there was something crooked somewhere and that it was his belief that my application was received on November 10th at the Baton Rouge office and that immediately afterwards the information was telephoned or telegraphed to some one up here with instructions to go out and stake the land out or to have it done immediately. He also stated that in his opinion, there are a number of parties in this section of the state who are apparently "staked" out and informed by someone in the Baton Rouge office whenever an application comes in. Further that irrespective of whom made application, if the prospect seemed good, one of these parties eventually got the patent in case of "stone or timber" or permit in case of 'oil and gas.' He also mentioned that the name of the lawyer in Baton Rouge who was mentioned in my previous letter was named Albritton, and that he or his friends usually were the ones who were the favored ones.

54

"On or about November 13th I mentioned to Mr. J. Y. Steele, of Minden, La. (Mr. Steele is one of the owners of the J. H. W. Steele Steamship Company and drills wells in wildcat territory for his hobby, and possible profit), that I had made application for this particular tract of land. He stated, 'You will never in the world get it,' or words to that effect, and continued that someone else would get it irrespective of the time I made application. These statements were the cause of my inspecting the land on the 20th.

"Mr. John H. Eastham, former mayor of Shreveport, and an oil and gas operator stated during the past week that he believed that there was a great deal of crookedness in the

local office. A number of others could be cited with the same belief. In fact it is more or less open talk among the operators here in regard to conditions existing at Baton Rouge.

"Mr. Snyder further stated to me yesterday that Jack Hardeman was in the vicinity of this tract of land on Sunday November 11th, which statement was amplified by stating that it was possible that he

(Col. Work, p. 2 June 8, 1924. 8871 5375 A-2

(Hardeman) might have posted the wrong land on that date. Neither Mr. Snyder or the other two parties mentioned have any interest whatsoever in who gets the permit, both Messrs. Snyder and Steele using him or have used him in locating sites from corners for drilling operations.

"I can make affidavit to the following. That I went over the land on November 20th, which was Tuesday, locating myself by the U. S. Geological Survey map, of which I have photostatic copies made during the progress of the work from the original plane table sheets, the course taken, and that I did not observe any stake posting the land in accordance with prescribed regulations, nor any blazes which were alleged to have marked the position of this stake. Further that I would have naturally observed such stake or blazes, having knowledge of the law and regulations governing such posting. But I cannot and will not say or swear that it was not on the 40 acres. This land is all swamp land and is covered with underbrush in most instances.

"A summary of the facts, I believe that will be uncovered by an official investigation follow:

"Application No. 010415 was received by local land office on November 10th. Examination of the records of the telephone or telegraph company will disclose that a message

went from Baton Rouge to either Shreveport or Minden notifying somebody that said application had been received and to post the land and make application thereunder. Land was posted some time between Nov. 10th and December 11th. Application was made, sent to the local office and held there until December 11th to be certain that no one else had previously posted the land (prior to Nov. 11th) and if so, to hold Hardemans application until after the prior party's 30 days had expired. This is in regard to the above numbered application alone. An investigation of other applications will undoubtedly develop similar messages and results.

"I am enclosing herewith a copy of letter from local office. You are requested to pay particular attention to the paragraph in regard to the time my application was stamped, and then to note the time stamped on the application. A photostatic copy of this letter will be forwarded you as soon as it is possible to procure a print, probably Monday. This letter shows evidence of having been copied in a letter book on tissue, so the local office will undoubtedly have a copy of it unless destroyed. The difference in the time is probably explained by the fact that the local office held my application until about closing time on November 12th to give plenty of time to post the land, and that on February 19, knowing the charge made by me as to delay and also the time land was claimed to be posted the early time, (opening hour) was stated in Mr. Reiley's letter.

"Your attention is also invited to a prior application made by me under number 010402 dated October 27, 1923, upon which application no report has ever been made. As I have since understood that there were several applications in for this tract, and as I was more interested in the application 010415, no request was made the local office for further information in regard thereto.

"As previously indicated, I have been urged by some of my

(Col. Work No. 3 June 8, 1924. 8872 5375 A-3

Democratic friends to turn this matter over to Pat Harrison for use in the coming campaign, but with the expectation of keeping the investigation quiet and void of notoriety incident to publicity, and in addition having been born in the Republican party (in New York State), naturally have declined to furnish up to the present any political propaganda to the Democratic party. One of those urging my taking this matter up for political purposes is Capt. John D. Ewing, Associated Publisher, Shreveport Times, and a son of Col. Rob't Ewing, late Democratic National Committeeman from Louisiana.

"Now, Colonel Work, I want it distinctly understood, I hold no animosity toward anybody in this matter. I am a good loser in a fair fight, but if I believe that a wrong has been done, I will fight 'until Hell freezes over' in an endeavor to right that wrong and clean up any crookedness.

"I realize that this is a long letter and that not much has been said, but know that many cases have been started on considerably less than this and developed into considerable magnitude. Take the case of Adolph Westfield who was reported by Military Intelligence in May 1918 from New York as being a German who had gone to Washington. He was located by the writer, lost by the Department of Justice, found by myself in France in November 1918, and reported executed by the French who had evidence that he was a spy.

"No evidence was available at first except that
56 he might bear watching, as were a great many innocent persons of German descent watched.

"Thanking you for your attention, I am

Yours very truly,

(Signed) "A. T. WITBECK,

A. T. WITBECK."

1 ENC.

On June 18, 1924, E. C. Finney, Acting Secretary of the Interior, replied to Witbeck's last letter as follows:

"8869

"The Secretary of the Interior
Washington

June 18, 1924.

"Mr. Albert T. Witbeck,
1610 Creswell Street,
Shreveport, Louisiana.

"My dear Mr. Witbeck:

"Reference is had to your letter of June 8, 1924, relative to oil and gas application by Jack Hardeman for lands which you desire.

"It was suggested in my letter to you of June 3, 1924, that you furnish affidavits as to the facts and the irregularity of action in the local land office at Baton Rouge, Louisiana, which you have not done. You merely reiterate a little more fully the statements made in your previous letter. However, I have directed that the entire matter be forwarded to Mr. Neal, Chief of Field Division at Jackson, Mississippi, with instructions to make an investigation of the

facts and report thereon. I have suggested that Mr. Neal call upon you and it will be appreciated if you will furnish him with any facts you may have, which will have a bearing on any alleged irregularity in the conduct of the business in the local land office at Baton Rouge.

"Upon the receipt of such report, such action will be taken as is warranted at that time.

"Sincerely yours,
(Signed) "E. C. FINNEY,
"Acting Secretary."

Again, on July 22, 1924, the First Assistant Secretary of the Interior, replying to another inquiry of Witbeck, wrote to him as follows:

"8867

"P. R. S. 5549 Baton Rouge 010415 "A" CAO

Department of the Interior
Washington

Jul 22 1924

"Mr. Albert T. Witbeck,
1610 Creswell Street,
Shreveport, Louisiana.

"My dear Mr. Witbeck:

"Reference is had to your letter of July 15, 1924,
57 relative to investigation of applications for oil and gas permits Baton Rouge 010415 and 010425.

"On June 25, 1924, Mr. Neal Chief of Field Division at Jackson, Mississippi, was furnished the letter you had addressed to me for his use in investigation, and he was also

advised to get in touch with you in relation to the matter. It is very likely that he has done so by this time. However, if he has not, it is probably that the amount of work he has before him has prohibited him from so doing. He has been furnished a copy of this letter so that his attention is again called to the situation.

"The photostatic copy of Mr. Riley's letter which you forwarded is on file with the record.

"Sincerely yours,
(Signed) "E. C. Finney,
"First Assistant Secretary."

Received July 22, 1924.

G. L. O.

On August 19, 1924, the First Assistant Secretary of the Interior wrote to James M. Neal, Chief of Field Division, Jackson, Mississippi, as follows:

"8866

"Department of the Interior
Washington

August 19, 1924.

"A-6623

"Mr. James M. Neal,
Chief of Field Division,
Jackson, Mississippi.

"Dear Mr. Neal:

"Herewith are the records in the matter of the conflicting applications of Jack Hardeman and Albert T. Witbeck for permits to prospect for oil and gas, Baton Rouge, serials 010425—010415, requested in your letter of August 9, 1924, to the Commissioner of the General Land Office.

"I have to request that your report and these records be sent direct to the Department at the conclusion of your investigation.

"Sincerely yours,
(Signed) "E. C. Finney,
"First Assistant Secretary."

"Inclosure—Records 010415-010425.

On September 28, 1924, an appearance was entered for Witbeck in the Department of the Interior by Messrs. Britton & Gray, Washington attorneys, to whom the First Assistant Secretary wrote on October 1, 1924, as follows:

58 "8865 McD.

"Department of the Interior
Washington

"A-6625 Oct 1 1924.
"Messrs. Britton & Gray,
1512 H Street N. W.,
Washington, D. C.

"My dear Sirs:

"I have your letter of the 28th instant, relative to Albert T. Witbeck v. Jack Hardeman, involving Baton Rouge 010415 and 010425.

"I have directed the Chief of Field Division to forward the report of his investigation direct to the Department. When the report is received, no action will be taken until you have had an opportunity to examine the record, now in the field.

Very truly yours,
(Signed) "E. C. Finney,
"First Assistant Secretary."

On October 24, 1924, Witbeck addressed the following communication to the Secretary of the Interior:

8864 6546

"Albert T. Witbeck
1610 Creswell Street
Shreveport, La.

Dept. of the Interior. Received Oct 28, 1924 Secy's Off., Appts., Mails & Files. To Solicitor.

Interior Dept. Received Oct 28, 1924 First Assistant Secretary.

October 24, 1924.

A-6623

"The Secretary of the Interior,
Washington, D. C.

Baton Rouge 010415
Baton Rouge 010425

Attention: Mr. E. L. Finney, 1st Asst. Secy.

"Sir:

"'Your attention is respectfully invited to the following irregularities in the application of Jack Hardeman, applicant under No. 010425 for Oil and Gas permit covering the NW¼ of NE¼, Section 25 Twp 21 N. R. 10 West, Louisiana Meridian.

"The said application is not in accordance with the regulations prescribed, governing applications made under Act of Feb. 1920 for the following reasons.

"1. But two references are given instead of the three required.

"2. Applicant does not disclose names of other interested parties in application other than A. D. Turner and does not furnish any other affidavit of citizenship except his own, which latter is taken before W. Burch Lee, whom this applicant believes and has so stated upon information and belief in affidavit made before J. G. Hilman, Special Agent of the General Land Office who is investigating
59 certain charges heretofore made, to be interested in the securing of permit.

"3. Application of Hardeman is not covered by affidavit as to the statements therein as required, no statement under oath occurring therein or attached thereto except affidavit of Hardeman's father as to birth and citizenship which is referred to above.

"4. This applicant is advised that the records of Application 010425 at the Baton Rouge Office show that no fees accompanied said application, as required.

"Therefore this applicant under application 010415 respectfully submits that, upon the above showing all of which is of official record, in justice and equity that application 010425 should be summarily rejected for non-compliance with prescribed regulations and not further considered.

"Respectfully submitted,
(Signed) "ALBERT T. WITBECK.
ALBERT T. WITBECK.
"Applicant under 010415
Baton Rouge."

On January 3, 1925, Witbeck, through his Washington counsel, filed before the Secretary of the Interior a petition invoking the supervisory power of the Department, the petition being entitled "Albert T. Witbeck vs. Jack Hardeman, Baton Rouge Serials 010415 and 010425," based upon the record, as supplemented by a report of a special agent. The petition called special attention to the fact that Witbeck's application was the first on file, and that Hardeman's application did not bear a jurat evidencing verification of it under Hardeman's oath, and the petition denied the allegation of previous posting of the land by Hardeman. The prayer of the petition was as follows:

"We ask therefore a readjudication of this matter in the light of all the facts, and to that end we move a vacation of the Departmental decision of April 16, 1924."

Neither Hardeman, nor any counsel for Hardeman, nor any one authorized to appear or act on his behalf was ever served with a copy of the aforesaid petition invoking the supervisory authority; and neither Hardeman, nor any counsel for Hardeman, nor any one having any authority to appear for Hardeman had any notice of the aforesaid petition until subsequent to January 12, 1925, and after said petition had been acted upon by the Secretary of the Interior, as hereinafter set out.

60 On receipt of this application, the Secretary of the Interior telegraphed the United States land office at Baton Rouge as follows:

"Wire date fees tendered by Jack Hardeman on Serial 010425."

To which the Register of the United States land office answered on the same date:

"Records show fees paid by Jack Hardeman in connection with Serial 010425 on December 19, 1923, Receipt 2759658."

The records further show that on December 13, 1923, George J. Reilly, Register of the United States land office, Baton Rouge, wrote to the plaintiff, Jack Hardeman, as follows:

"Jack Hardeman,
Minden, Louisiana.
"Sir:

"We are in receipt of your application to prospect for oil and gas, with the affidavit as to posting on the land on November 11th, and we are herewith enclosing you copy of the regulations concerning oil and gas permits, which shows on page 26, par. 31, the amount of fees required with an application of this kind, which is $10.00, and this should be sent payable to the Register of the United States Land Office."

The record shows that on January 12, 1925, E. C. Finney, First Assistant Secretary of the Interior, rendered decision as follows:

"Department of the Interior,
Washington.

"A.6523,
Address only
The Secretary of
The Interior.

January 12, 1925.

"N"
Baton Rouge 010415
010425

Albert T. Witbeck
v.
Jack Hardeman.

Application of Witbeck rejected.

Reconsideration of Appeal from the General Land Office.

Decision Promulgated
Jan. 13, 1925.

"By decision of April 16, 1924 (50 L. D. 413), the Department held that Jack Hardeman was entitled to a preference right to a permit under section 13 of the Act of February 25, 1920 (41 Stat., 437), to prospect for oil and gas upon the NW. ¼ NE. ¼, Sec. 25, T. 21 N., R. 10 W., La. M., Louisiana, by reason of having posted on the land, within 30 days prior to the date of his application, a notice of intention to apply for a prospecting permit. The like application of Albert T. Witbeck was held to have been filed subsequent to the date Hardeman's notice was posted,
61 and was therefore rejected, the decision appealed from being affirmed.

"After the date of said decision, Witbeck alleged that the local office at Baton Rouge was guilty of irregularities in connection with the receipt of his application, for which reason final action on the conflicting applications was suspended and an investigation ordered. The report of the investigation has been received, upon consideration of which the Department has concluded that the charges were not sustained."

"A petition for the exercise of supervisory authority has been filed on behalf of Witbeck, but action thereon is rendered unnecessary because examination of the record has brought to the attention of the Department sufficient to demand the reconsideration of the appeal.

"Witbeck's application is indorsed as filed on November 12 1923, at 3:30 p. m., while Hardeman's application was filed December 11, 1923, at 3 p. m., in which he set forth:

"'I hereby claim preference right to this permit by reason of the fact that on November 11, 1923, I located the land herein mentioned, and erected in the center thereof a monument more than four feet high, and more than four inches square, on which I posted two notices of my intention to apply for this permit, a copy of which is hereby attached.'

"The copy of the posted notice referred to described the land as follows:

"Northwest Quarter of the Northeast Quarter (NW¼ of NE¼), Section Twenty-five (25), Township Twenty-one (21) North, Range Ten (10) West, Louisiana Meridian, Webster Parish, Louisiana, containing forty (40) acres, more or less.

"Aside from the failure to incorporate in the posted notice the number of the township, the application was not under oath, and the allegations as to the posting of the notice were not corroborated. Moreover, the required fee was not tendered with the application, and was not paid until December 19, 1923.

"In the case of J. Sam Friedman (50 L. D., 581), the Department held that as the regulations of March 11, 1920 (47 L. D., 437), do not specify the procedure to be followed as to the payment of the filing fees, the general instructions (Circular No. 616), approved August 9, 1918 (46 L. D., 513), govern. Paragraph 8 of said Circular No. 616 provides that "Where no money is tendered, the application, etc., will be rejected."

"Even if Hardeman's application has been under oath and corroborated, and if the posted notice had properly described the land, his failure to tender the required filing fee within 30 days after the date of the alleged posting defeated his

claim of preference right. When one asserts a preference right to a prospecting permit, it is necessary that he comply literally with all the provisions of the governing regulations, which have all the force and effect of law.

"For the reasons aforesaid, the Department must
62 hold that Hardeman did not properly assert his claim of preference right within the time allowed, and that Witbeck's application is entitled to priority.

"The decision of April 16, 1924, is vacated to the extent it conflicts with the views herein expressed, and the decision appealed from is reversed.

(Signed) "E. C. FINNEY,
"First Assistant Secretary."

Thereupon motion for rehearing was filed with the Secretary of the Interior in behalf of Jack Hardeman by his Washington counsel, in which he assigned the following errors, to-wit:

"I.

"It denied Hardeman's duly acquired statutory preference to a permit because Hardeman had not done what neither the leasing statute nor any regulations thereunder required that he do, viz, pay a fee to the local land office during the period of thirty days following marking and posting of the land.

"II.

"It denied Hardeman's duly acquired statutory right of preference to a permit upon the hypothesis that it is of the purposes of the leasing statute to cause an application

in exercise of a preference right to a permit to be accompanied with a fee at the time such application is filed in the local land office.

"III.

"It denied Hardeman's duly acquired statutory right of preference to a permit because of a theory that some statute or some regulatory power in the Secretary of the Interior had caused it to be a condition precedent to the effectiveness of the application in exercise of a preference right to a permit from the time of the filing of such application, that the application, at such time, be accompanied with a fee for the compensation of local land office in receiving and acting upon it.

"IV.

"It denied Hardeman's duly acquired statutory right of preference to a permit because of a belief that a person who seeks the benefit of the leasing statute is charged by law with notice of and with a duty to comply with Departmental regulations that were issued prior to enactment of that statute; that were not either by incorporation or reference made a part of the regulations under the leasing statute, and that were designed solely for the information and guidance of officers and employees of the Interior Department in connection with the fiscal accounting system of that Department.

"V.

"It denied Hardeman's duly acquired statutory right of preference to a permit because of a misunderstanding of the scope of the provisions of Paragraph 8 of Circular 616

of August 9, 1918 (46 L. D., 513 to 617); said
63 provisions expressly relating exclusively to applications et cet unaccompanied with fees 'required by law or regulations,' while neither the leasing law nor any regulations thereunder requires that an application in exercise of the statutory right of preference to a permit shall be accompanied with a fee.

"VI.

"It denied Hardeman's duly acquired statutory right of preference to a permit because of a conclusion that such right lapsed and was extinguished owing to Hardeman's failure to pay a fee under his application until after filing of an application and payment of a fee by Witbeck.

"VII.

"It denied Hardeman's duly acquired statutory right to a permit because of an opinion that Witbeck acquired such a right or interest in and to the land by the filing of an application for permit and the payment of a fee thereunder as sufficed to render it legally impossible for the Secretary of the Interior to decide that Hardeman did not lose his priority by failure to do what neither any law nor any regulation required that he do, viz, pay a fee 'during the period of thirty days following such marking and posting.'

"VIII.

"It denied Hardeman's duly acquired statutory right of preference to a permit because of a belief that while the leasing statute did not require his application to be under oath, a regulation under that statute did and that such regulation prescribed a jurisdictional requirement.

"IX.

"It denied Hardeman's duly acquired statutory right of preference to a permit because of the idea that a typographical error in the preparation of that copy of Hardeman's posted notice which accompanied his application caused the number of the township to be omitted from such copy, and that such clerical oversight was such a defect as constituted a default under a regulation so serious in its effect as to render Hardeman's application, ineffective and invalid; and this notwithstanding that the application itself accurately and fully described the land.

"X.

"It denied Hardeman's duly acquired statutory right of preference to a permit because the judgment ignored and disregarded the right in Hardeman to cure, by amendment, and in accordance with established practice, the only formal defects in his application that are noted in said judgment, to-wit, the omission to make oath to the application and the typographical error in the copy of the posted notice."

There was also filed in connection with this motion for rehearing a brief in support thereof. Annexed to such brief, and made a part thereof, and tendered to
64 the Department of the Interior for consideration of such motion on its merits, were the following papers, to-wit: The paper described as the original of the notice posted by Jack Hardeman on the land in controversy on November 11, 1923; an affidavit by Jack Hardeman alleging that such paper was in truth the original of such notice; and affidavits by Allen Johnson and Stephen G. Banks, these affiants alleging that they witnessed the

posting of notice on the land in controversy on November 11, 1923, and that the papers described as the original of such notice was in truth the notice originally posted. The paper so described as the original notice accurately and fully described the land in controversy here.

In connection with this motion, application was made for oral argument, which was allowed, and rehearing refused; and an application was also filed by Hardeman's attorney for leave to show that Hardeman's application was in fact sworn to when it was executed and before it was filed, but that execution of a jurat by the officer who administered the oath was inadvertently omitted, which was likewise refused.

On March 5, 1925, the Secretary of the Interior rendered and promulgated a written opinion overruling the motion for rehearing filed on behalf of Hardeman, on which oral argument had been had, as above set out. This opinion is in words and figures as follows, to-wit:

"Department of the Interior
Washington.

"A.6623. March 5, 1925.

"N"

"Albert T. Witbeck Baton Rouge $10415
010425

v. Application of Witbeck allowed.

Jack Hardeman. Rehearing denied.

"Motion for Hehearing.

"A motion for rehearing has been filed on behalf of Jack Hardeman in the matter of his application for a permit under Section 13 of the Act of February 25, 1920 (41 Stat., 437), to prospect for oil and gas upon the NW.¼ NE¼,

Sec. 25, T. 21 N., R. 10W., La. M., Louisiana, wherein the Department, by decision of January 12, 1925, on
65 reconsideration of an appeal by Albert T. Witbeck, held that Hardeman had not properly asserted his claim of preference right within the time allowed, the decision of April 16, 1924 (50 L. D., 413), being vacated to the extent it conflicted with the views expressed.

"Oral argument in support of the motion was submitted February 27, 1925, at which time counsel for Hardeman tendered an amendment of his application for permit and asked that it be filed, and that the application as thus amended stand and be effective from and after December 11, 1923.

"The following material facts are not in dispute: On November 12, 1923, said Witbeck applied for a permit to prospect for oil and gas upon the land, tendering therewith the required fee ($10). Hardeman's application was filed at 3 p. m. on December 11, 1923, the application alleging that he had posted a notice on the land at 10:25 a. m., on Sunday, November 11, 1923. The application was not under oath, and the required fee was not tendered until December 19, 1923.

"The departmental decision of January 12, 1925, alluded to the fact that attached to Hardeman's application was what purported to be "a true copy" of the posted notice, but which, in the description of the land, did not contain the number of the township. With the motion for rehearing was filed what is alleged to be the original of the posted notice, in which the land involved is correctly described.

"Counsel for Hardeman contends that Hardeman acquired a statutory right of preference to a permit by posting on the land, on November 11, 1923, a notice to the effect that within 30 days he would apply for a prospecting permit and that

such right was not defeated by the failure to tender within 30 days a formal application, under oath, accompanied by the fee prescribed by paragraph 31 of the regulations March 11, 1920 (47 L. D., 457), in that, in accordance with established practice, Hardeman had the right to cure, by amendment, the omission of an oath to his application, and, further, that neither the Act of February 25, 1920, supra, nor the regulations thereunder require the payment of the filing fee within 30 days following the posting of notice.

"Paragraph 31 of the regulations of March 11, 1920, supra, provides:

"'Under the authority of Section 38 of the act, the following fees and commissions are prescribed for transactions under the act:

"'(a) For receiving and acting on such application for a permit, lease, or other right filed in the district land office in accordance with these regulations, there shall be paid a fee of $2.00 for each 160 acres, or fraction thereof, in such application, but such fee in no case to be less than $10, the same to be paid by the applicant and considered as earned when paid, and to be credited in equal parts on the compensation of the register and received within the limitations provided by law.'

"The fee fixed in the paragraph quoted is 'for receiving and acting' on the application. If it was to be paid at some time in the future, it may be assumed that the
66 regulations would have so provided; but in the absence of such a provision, an interpretation of the paragraph such as counsel for Hardeman contends for could not be justified.

"Had the register of the local land office complied with paragraph 8 of the regulations (Circular No. 616), approved August 9, 1918 (46 L. D., 513), he would have rejected Hardeman's application when filed. Said paragraph 8 provides:

"'Where no money is tendered.—Applications, declarations, etc., which are not accompanied by the proper remittances in form or in amount required by law or regulations to be tendered at the same time they are filed will be assigned current serial numbers. * * * Where no money is tendered, the application, etc., will be rejected. On such rejection, the applicant, of course, has the right of appeal within 30 days, under the "Rules of Practice," merely against rejection of the application, however, for the reason that no money was received therewith, unless, of course, there are additional causes for rejection at the time the application is received by you. You will not in such cases, pending the receipt of the money, segregate the land, as the law and regulations are specific in that the money must be tendered with the application, and if it is not transmitted the applicant acquires no rights under the application until the money is tendered. * * *'

"The instructions of which said paragraph 8 is a part prescribed the practice which should have been followed by the local officers when Hardeman's application was filed; and inasmuch as the regulations of March 11, 1920, supra, fixed the fee which should have accompanied the application when filed, the duty of the local officers was plain. Not being accompanied by any part of the filing fee, the application was without any force and effect—a mere nullity, and not subject to any action, after the lapse of 30 days from the date of the alleged posting of notice, which could preserve the claim of preference right.

"Counsel for Hardeman concedes that the regulation which prescribes that applications for permits must be under oath was adopted under authority conferred by the Congress, but he contends that the right of amendment exists—that he should be allowed now to cure the omission by filing an amended application.

"The rules of Courts and of the Department are liberal in the matter of amendment; but Hardeman's application was the assertion, in the presence of a conflicting application, of a preference right, as to which paragraph 5b of the regulations of March 11, 1920, supra, under 'Preference Right, How Secured,' provides:

"'The preference right will exist for 30 days after the date of posting such notice, and if no application is filed within that time, the land will be subjected to any other application for permit or to other disposal.'

"It is true that Hardeman filed, within 30 days after the date of the alleged posting, what was described as an application for a permit, and that the register of the local land office failed to take the action prescribed by paragraph
67 8 of the regulations of August 9, 1918, supra; but the failure of the register to perform his duty in the matter cannot be allowed to result in an undue advantage to Hardeman at the expense of Witbeck.

"In accordance with established practice, Hardeman could have amended his application after it was filed by making it comply with the regulations, but the right of amendment did not extend beyond 30 days after November 11, 1923, the time within which he could pay the fee required by law and regulations, and without which payment his application was of no effect.

"Counsel urges that Hardeman was not aware prior to service on him of a copy of the decision of January 12, 1925, that his application was defective, and claimed the right, at the oral hearing on the motion, to then file an amended application. Even if it were conceded that Hardeman had the usual time provided by the Rules of Practice after notice within which to file an amended application, the tendered amendment could not be accepted. He was served on January 20, 1925, with a copy of the decision of January 12, 1925, and the amended application was tendered 30 days later—towit, on February 27, 1925.

"Counsel has cited a number of reported cases in support of his contention in regard to the right to amend, but none are applicable to the case under consideration.

"Hardeman did not file a proper application for a permit within 30 days after the legal posting of a notice. It follows that his claim of preference right must be denied, the decision of January 12, 1925, being adhered to.

"The amended application tendered on February 27, 1925, stands rejected.

(Signed) "E. C. FINNEY,
"First Assistant Secretary."

This was all the documentary evidence on the part of the plaintiff, with the exception of Circular No. 616, of August 9, 1918 (46 L. D., 513 to 617), captioned "Methods of Keeping Records and Accounts Relating to the Public Lands," and Circular No. 672, of March 11, 1920 (47 L. D., 437), issued by the General Land Office, being the regulations concerning oil and gas permits and leases. These circulars, though offered in evidence, were never actually filed; but it is here and now agreed that they are official public documents, duly published and promulgated, and that judicial notice of their contents may be taken by the Court.

The above is all the documentary evidence offered by the plaintiff.

Jack Hardeman, the plaintiff, was then called as a witness in his own behalf and, after being duly sworn, was asked his age; whereupon counsel for defendant objected to this question, and to all other questions going to show the qualification of the witness as an applicant for an oil and gas permit, or to show any of the other facts set out in the bill of complaint, for the reason that

"the jurisdiction of the Federal Courts, if there be any, in cases such as this, is limited to an inquiry as to whether the Secretary erred as a matter of law; that in any case the findings of fact of the Secretary of the Interior are conclusive upon the Courts, because the Interior Department is a quasi-judicial tribunal of limited statutory jurisdiction, to which is confided the administration, care and disposition of public lands; and that the findings of fact of the Secretary of the Interior, in the exercise of that jurisdiction, are final and conclusive where the Secretary of the Interior has finally issued a patent or other evidence of final disposition of public lands."

After argument, the Court ruled that the testimony should be admitted, subject to the objection, the legal effect thereof to be later passed upon, and by agreement the objection interposed by defendant was made general so as to cover any testimony as to any facts.

Subject to this objection, the witness testified that he would be 39 years of age on July 17, 1927; that he was therefore more than 21 years of age on the 11th day of November, 1923; that he is a native-born citizen of the United States, and resided in November, 1923, in Minden

Webster Parish; that he was not the holder of any interest in any oil and gas permit in the United States. The witness testified that he himself prepared his application, signed it and swore to it before W. B. Lee, Clerk of the United States District Court, in the presence of his father, who at the same time made affidavit to the date and place of birth of the witness; that he, the witness, at that time swore to all of the facts set forth in the application, which as a witness he again swore to be true; that he was not advised by the register or receiver at Baton Rouge that there was no jurat attached to his application, and never received notice thereof until after the decision of January, 1925,
69 in favor of Witbeck; that on the 11th of November, 1923, he ran out and established the corners of the Northwest Quarter of the Northeast Quarter of Section 25, Township 21 North, Range 10 West, the land described in his application, and marked notches in three or four trees, and nailed one poster on the north side and one on the south side; that the notice was tacked on at 10:25 or 10:45 of the morning of November 11, 1923; that the notice attached to his application was a true copy of that which he posted on the land; that the notice that he placed upon the land correctly described the property, but the one attached to his application contained a typographical error, omitting the township number. The witness testified that he had in possession at the time Circular 672 of the General Land Office and governed himself, "as near as he could figure it out, by the provisions contained in the circular;" and that he did not have at that time any knowledge of Circular No. 616 or its contents. He testified that the application was mailed to Baton Rouge on December 10, 1923; that he was later notified by the register and receiver to remit the $10 filing fee, which he promptly remitted, and of which he obtained acknowledgement; and that the $10 has never been refunded to him.

On cross examination, the witness testified that Mr. Lee, the Clerk of the Court, because of service in getting it drilled was to get an undetermined interest if oil was found.

T. J. HARDEMAN, being sworn, testified that he is the father of the plaintiff; that he is a civil engineer; that he has been living in Webster Parish since November 1, 1907; and that he is 68 years of age; that he appeared with his son before Mr. Lee, the Clerk of the Federal Court, and made an affidavit as to his son's birthplace and date of birth; that his recollection is that his son signed an affidavit at the same time; and that oath was administered to the witness and to his son.

STEPHEN BANKS, being sworn, testified that he is 69 years of age and lives in Webster Parish; that he
70 went with Jack Hardeman to locate the land, at which time they ran the four corners of the land, marked them and posted notice; that this was on the 11th of November, 1923; and that he and Hardeman were accompanied by a man named Allen Johnson, who helped them run the lines.

PAUL R. HALLAM was then sworn, and testified that he is an employee of the United States land office at Baton Rouge; and he identified the records which had been previously offered in evidence by the plaintiff.

Jack Hardeman was then recalled by counsel, and testified that after the decision of the Secretary of the Interior of date April 16, 1924, he received no further notice from the Land Department or from Mr. Witbeck that there were any defects in the witness' application, or that any further proceedings were to be had in the case; and that he had no notice that the Secretary of the Interior had reopened or was reconsidering his case; that the first time he knew anything about Mr. Witbeck's contest for the lease was

when a special agent of the land office, Mr. Hillman, "was checking up and taking affidavits around." He stated that he acted under the assumption that the decision of April 16, 1924, was final until he heard of the decision of January, 1925, after which time he attempted to get a rehearing.

5.

Counsel for defendant then offered in evidence the following:

First, certified copy of the record in the matter of the application of Albert Tyler Witbeck for an oil and gas permit, Baton Rouge Serial No. 010415.

The matters shown by this record are all disclosed by the other records filed in evidence and hereinabove set out.

On May 6, 1925, an order was sent to the register and receiver at Baton Rouge, Louisiana, enclosing a copy
71 of the opinion rejecting Hardeman's application and closing the case.

On May 6, 1925, an oil and gas lease and permit was executed by the Secretary of the Interior to Albert T. Witbeck as follows:

"Oil and Gas Prospecting Permit.

The United States of America.
Department of the Interior
General Land Office

"U. S. Land Office, Baton Rouge, La.

Serial No. 010415.

"Know all men by these presents: That the Secretary of the Interior, under and by virtue of the Act of Congress entitled "An act to promote the mining of coal, phosphate, oil, oil shale, gas and sodium on the public domain," approved February 25, 1920, has granted and does hereby

grant a permit under Section 13 to Albert Tyler Witbeck, 1610 Creswell Street, Shreveport, Louisiana, granting him the exclusive right for two years from the date hereof to prospect for oil or gas, but for no other purpose, the following described lands:

"NW¼, NE¼, Sec. 25, T. 21 N., R. 10 W., L. M., Louisiana, containing 40 acres, upon the express conditions following:

"1. To mark each of the corners of the claim within thirty days from the date hereof with substantial monuments so that the boundaries can be readily traced on the ground, and post in a conspicuous place, upon the lands covered hereby, a notice that such a permit has been granted, and a description of the lands covered by this permit.

"2. Within six months from date hereof to install upon some portion of the lands a substantial and adequate drilling outfit and to commence actual drilling operations.

"3. Within one year from date hereof to drill one or more wells, not less than six inches in diameter, to a depth of at least 500 feet each, unless valuable deposits of oil or gas shall be sooner discovered.

"4. Within two years from date hereof to drill one or more wells to a depth of at least 2,000 feet, unless valuable deposits of oil or gas shall be sooner discovered.

"5. Not to drill any well within 200 feet of any of the outer boundaries of the land covered by this permit unless the adjoining lands have been patented or the title thereto otherwise vested in private owners.

"6. To carry on all operations hereunder in accordance with approved methods and practice; to use all reasonable precautions to prevent waste of oil or gas developed in the

land, or the entrance of water through wells drilled by permittee to the oil sands or oil-bearing strata to the destruction or injury of the oil deposits, and to carry out, the expense of the permittee, all reasonable orders of the Secretary of the Interior relative to prevention of waste and preservation of property, and to comply with such regulations as may be issued by the Secretary of the Interior as to methods of operation.

"7. To furnish and maintain during the period of this permit a bond with a qualified corporate surety, in the sum of $2,000, or such other amount as the Secretary of the Interior may at any time require: (a) against the failure of the permittee to repair promptly, as far as possible, any damage to the oil strata or deposits resulting from improper methods of operation; (b) to reimburse damage sustained by any reclamation homestead entryman, pursuant to the requirements of paragraph eigth hereof; (c) to pay any damage caused to any reclamation project or the water supply thereof, by failure to comply with the requirements of paragraphs nine and ten hereof; (d) that as to any lands covered by this permit, embraced in any non-mineral application, entry, or patent, with a reservation of the oil and gas deposits to the United States, pursuant to the Act of July 17, 1914 (38 Stat. 509), under rights initiated prior to the application for permit, the permittee shall reimburse such nonmineral applicant, entryman, or patentee for all damage to crops or tangible improvements caused by drilling or other prospecting operations.

"8. That as to any lands covered by this permit which are also embraced in any reclamation homestead entry heretofore or hereafter made under a reservation of the oil and gas to the United States, permittee shall reimburse the entryman for all damages to crops or improvements caused by such drilling or other operations, such damage to include reinbursements of the entryman by the permittee, of all

reclamation charges for construction, operation, and maintenance for the portion of the land used and occupied by the permittee during the period of such use and occupation.

"9. That as to any lands covered by this permit within the area of any Government reclamation project or in proximity thereto, the permittee shall erect such dikes and embankments or take such other precautions as may be necessary as required by the Project Manager, effectively to impound any flow of refuse oil, salt water, or oil from wells drilled, to prevent any injury to lands susceptible of irrigation under such project or injury to the water supply thereof; provided, further, that the permittee is prohibited from drilling upon any constructed works of the Bureau of Reclamation or right of way therefor.

"10. This permit is granted upon the express condition that if any of the land covered thereby is embraced in a forest, reclamation, power, or other withdrawal or is segregated for any particular purposes, operations under this permit shall be so conducted as not to interfere with the administration and use of the land for the purpose for which withdrawn or segregated to a greater extent than may be determined by the Secretary of the Interior to be necessary for the most beneficial use of the land, and on the further condition that in the event of discovering of oil or gas within the permit area, appropriate conditions for protection of the uses and purposes for which the land is withdrawn or segregated may be incorporated in any lease or leases which may be issued.

73 "10½. That pursuant to Section 1 of the Act, the ownership of and the right to take all helium from any gas discovered under this permit in a manner and under such rules and regulations as may be prescribed by the Secretary of the Interior, is hereby reserved.

"11. That this permit is granted upon the express condition that the right is reserved to the Secretary of the Interior to permit upon such terms as he may determine to be just, for joint or several use, such easements, or rights of way, including easements in tunnels upon, through, or in the lands covered hereby, as may be necessary or appropriate to the working of the same, or of other lands containing the deposits described in the act under which this permit is granted.

"12 The granting of this permit shall not preclude the allowance of entry, location, or selection of any of the lands included therein, where such entry, selection, or location is made with a reservation of the mineral deposits to the United States.

"13. That until this permittee shall apply for a lease to one-quarter or more of the area included herein, he shall pay to the United States 20 per cent of the gross value of all oil or gas secured by him from the lands and sold or otherwise disposed of, or held by him for sale or other disposition.

"14. The Secretary of the Interior reserves the right and authority to cancel this instrument for failure of the permittee to comply with any of the conditions enumerated herein or to exercise due diligence in the work of development.

"Valid rights existing at the date of this permit will not be affected hereby.

"Dated this 6th day of May, 1925.

(Signed) "E. C. FINNEY,
"First Assistant Secretary of
the Interior."

The record further discloses an extension of time granted by the Department to Witbeck, of date August 14, 1926, for the commencement of operations under the terms of said

permit until three months after the final determination of the litigation in the instant suit, "Equity Suit No. 227 in the District Court of the United States for the Western District of Louisiana, Shreveport Division, Jack Hardeman v. Albert Tyler Witbeck."

The same record shows the filing of bond, pursuant to the statute, by Witbeck, and the consent of the surety to the extension of time.

Counsel for defendant then offered in evidence certified copy of the transcript of the record in the cause entitled
74 "Jack Hardeman, Plaintiff, v. Hubert Work, Secretary of the Interior, William Spry, Commissioner of the General Land Office, and Albert T. Witbeck, Defendants, No. 44756 in Equity in the Supreme Court of the District of Columbia," which record is attached to and made a part of the answer of the defendant herein, and which for that reason it is unnecessary again to copy into the record.

As shown by the stenographer's note of evidence, the above is all of the evidence offered.

THIGPEN, HEROLD, LEE & COUSIN,
Attorneys for defendant-appellant,
PUGH, GRIMMET & BOATNER,
Attorneys for Appellee,
J. M. GRIMMET,
Atty. for Appellee.

Approved:

BEN C. DAWKINS,
Judge.

Filed Jan. 19, 1928.

75 OPINION OF COURT.

(Title Omitted.)

Pugh, Grimmet & Boatner, Shreveport, La., Attorneys for Complainant.

Thigpen, Herold, Lee & Cousin, Shreveport La.; Attorneys for Respondent.

DAWKINS, J.:

A careful consideration of the law and evidence of this case convinces me that the complainant is entitled to judgment in his favor as prayed for in the bill of complaint.

Decree in accordance with these views may be presented.

Thus done and signed at Shreveport, Louisiana, this the 15th day of November, A. D. 1927.

BEN C. DAWKINS,
U. S. D. J.

Filed Nov. 15, 1927.

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76 DECREE.

(Title Omitted.)

This cause having come on to be heard on the bill therein, the answer thereto, the evidence adduced in behalf of the plaintiff and defendants, and having been argued and submitted by counsel for the parties;

Whereupon, the Court being fully informed in the premises, and on consideration thereof, it is, by the Court, this 28th day of November, 1927, finally decreed:

First. That the certain permit to prospect the northwest quarter of the north-east quarter of section twenty-five, in township twenty-one north of range ten west of the Louisiana Meridian, in the State of Louisiana, for oil and gas, pursuant to the provisions of the act of Congress of February 26, 1920, 41 Statute at Large, 437, Chapter 85, that was issued to the defendant Albert T. Witbeck, on the sixth day of May, 1925, by the Secretary of the Interior of the government of the United States of America, was issued to the said Witbeck by the said Secretary in derogation, disregard and violation of the accrued preference, prior and superior claim and right thereto under the said act of February 25, 1920, of the plaintiff, Jack Hardeman.

Second. That by reason of the aforesaid action of the said Secretary of the Interior in so issuing the said permit to the defendant, Albert T. Witbeck, neither the said Witbeck, nor any assignee, or assignees of the said Witbeck, if any, has or have now, and never has or have had at any time since the date of issue of the said permit, namely, the sixth day of May, 1925, any title, estate, right, interest or claim whatsoever in, or to or under said permit, other than as the trustee or trustees of the legal title thereto for the sole and exclusive use and benefit of the plaintiff, Jack Hardeman.

Third. That the plaintiff, Jack Hardeman, now is the equitable owner of the said permit, and has been the equitable owner thereof continually since the date of the issue thereof, namely the sixth day of May, 1925, and is rightly and justly entitled to have vested in him the legal title thereto and thereby become possessed of the complete title to said permit.

Fourth. That the plaintiff, Jack Hardeman, is rightly and justly entitled to have and receive from the defendant Albert T. Witbeck, or/and from his assignee, or/and from his assignees, if any, all the profits in any manner whatsoever, or at any time whatever, derived by him or them from any oil or gas produced from the aforesaid land, or from any use or occupancy of the said land, or under any agreement with others in any wise relating to the said land, since issue of the permit aforesaid; and is further
77 rightly and justly entitled to any and all rights and benefits incident to or accruing under the said permit by reason of any law or laws, or valid regulations thereunder, enacted pursuant to the authority of the United States.

And it is, by the Court, this twenty-eighth day of November, 1927, ordered in effectuation of the foregoing decree,

A. That the defendant, Albert T. Witbeck, or/and his assignee, or/and his assignees, if any, within ten days from service upon him or them, or upon any of the counsel for said Witbeck in this cause, of a copy of the foregoing decree and this accompanying order duly certified by the Clerk of this Court, make sign and otherwise execute and deliver to the plaintiff, Jack Hardeman, a due instrument of assignment by the said Witbeck, or/and by his assignee, or/and by his assginees, if any, of all the legal title, estate right, interest, or claim whatsoever of the said Witbeck, or/and of his assignee, or/and of his assignees, if any, in, to or under the said permit, to the said Hardeman.

B. That in default of the execution and delivery of such assignment, as required in the preceeding paragraph hereof, or in event that service of the copy referred to in that paragraph cannot be made upon the said Witbeck or upon any of

his said counsel, after the exercise of due deligence to make the service at the usual place of residence or business of the said Witbeck, or the said counsel, then and in that event such assignment shall be made, executed and delivered by T. Overton Brooks United States Commissioner for the Shreveport Division of the Western District of Louisiana or his successor or successors in office, in the name and on behalf of said defendant; the said United States Commissioner, or his successor or successors in office, being given full power to act in the premises and the assignment so executed by him shall have the same force and effect as if executed by the said Albert T. Witbeck, defendant, or/and by his assigned, or/and by his assignees, if any.

Fifth. The Court retains jurisdiction of this cause to make and render such orders and decrees as may be necessary relative to the execution and delivery of the aforesaid assignment, and to secure the full recognition and enforcement of the trust herein declared in favor of the said Jack Hardeman.

And it is further decreed, that the plaintiff, Jack Hardeman, have and receive from the defendant Albert T. Witbeck, the said plaintiff's reasonable costs, to be taxed by the Clerk and that execution issue therefor as at law.

By the Court:

BEN C. DAWKINS,
Judge.

Filed Nov. 28, 1927.

78 SPECIFICATION OF ERRORS.

(Title Omitted.)

In the above styled and numbered cause, comes now the defendant, Albert T. Witbeck, and respectfully shows that in the opinion and decree herein handed down and signed there is manifest error to his prejudice.

And for specification of errors, he shows that the Court erred:

1.

In overruling his motion to dismiss the bill of complaint for want of equity.

2.

In overruling his motion to dismiss the bill of complaint for failure of the plaintiff to state a cause or right of action.

3.

In overruling his motion to dismiss the bill of complaint based upon want of jurisdiction by the Court of the subject matter of the suit, because of title to the property being in the United States.

4.

In overruling his motion to dismiss the bill of complaint because of the United States' being an indispensable party to the proceeding.

5.

In sustaining the contention of the plaintiff that the action of the Secretary of the Interior in issuing the permit for exploration for oil and gas might be reviewed by the Courts.

6.

In holding that the Secretary of the Interior had no right to exercise his supervisory power after the rendition of his first opinion of date April 16, 1924.

7.

In holding that the Secretary of the Interior did not possess the right, under the exercise of his supervisory power, to review, modify or reverse any decision previously rendered prior to the final act which under the law he was called upon to perform.

8.

In ignoring and treating as void Rule 86 of the Rules of Practice, promulgated by the Secretary of the Interior, 48 Land Decisions 261, providing:

79 "No rule here prescribed shall be considered to deprive the Secretary of the Interior of any direct or supervisory power conferred upon him by law."

9.

In holding that the rules of the Interior Department, approved by the Secretary of the Interior on August 9, 1918, in Volume 46 of the Land Decisions, page 516, providing,

among other things, that where no money is tendered the application will be rejected, were without force or effect.

10.

In holding that the filing of the application without the tendering of the legal fees created any rights in the applicant.

11.

In holding that the application filed by the defendant in due form, and accompanied by all the requirements of the Interior Department, when no legal application by the plaintiff was on file within thirty days of posting the land, did not give the defendant a better right to a permit.

12.

In holding that the filing by the plaintiff of his incomplete application, not sworn to and not accompanied by a payment of fees, vested in said Hardeman, after the expiration of thirty days from posting, any rights whatsoever to the prejudice of the defendant, Witbeck, whose application, in strict conformity to the Rules of Practice, was on file prior to that of Hardeman.

13.

In treating as null the provisions of the rules promulgated by the Secretary of the Interior, 47 Land Decisions 437 et seq., providing:

"The granting of a prospective permit for oil or gas is discretionary with the Secretary of the Interior, and any application may be granted or denied, either in part or in its entirely, as the facts may be deemed to warrant."

14.

In holding that the plaintiff was not concluded by the decision of the Supreme Court of the District of Columbia in suit No. 43,756 in Equity, entitled "Jack Hardeman, Plaintiff, vs. Hubert Work, Secretary of the Interior, William Spry, Commissioner of the General Land Office, and Albert T. Witbeck," the record in which is attached to the answer of the defendant in this case.

15.

In holding that the plaintiff was not bound by his election or remedies in the suit instituted by him in the Supreme Court of the District of Columbia and there decided adversely to him.

80

16.

In holding that the plaintiff had a clear legal right to the permit here sued for.

17.

In holding that the plaintiff was not bound by the final decision of the Secretary of the Interior awarding the permit to this defendant.

18.

In rendering judgment for the plaintiff.

Wherefore, defendant prays that the judgment be reversed.

THIGPEN, HEROLD, LEE & COUSIN,
Attorneys for Defendant.

Filed Nov. 28, 1927.

81 MOTION FOR APPEAL, AND ORDER GRANTING SAME.

(Title Omitted.)

In the above styled and numbered cause, comes now the defendant, Albert T. Witbeck, and, showing that there is manifest error to his prejudice in the decree herein rendered and signed, for the reasons set out in the specification of errors hereinbefore filed, moves and prays that he be granted an appeal, with supersedeas, to the Honorable the Circuit Court of Appeals for the Fifth Circuit.

THIGPEN, HEROLD, LEE & COUSIN,
Attorneys for Defendant.

ORDER.

Let the appeal be granted as prayed for, to operate as a supersedeas, upon the defendant's furnishing bond in the sum of One Thousand & no/100 Dollars, ($1000.00) conditioned according to law.

Dated at Shreveport, Louisiana, November 28, 1927.

BEN C. DAWKINS,
United States District Judge.

Filed Jan. 19, 1928.

Service of Citation accepted and formality of service waived.

PUGH, GRIMMET & BOATNER,
By J. M. GRIMMET,
Atty. for Appellee.

82 Western Union

Received at
83 SV RB 13 Collect Govt 1 EX
Ward Bldg. Branch, 525 Marshall
St. Shreveport, La.

New Orleans La 1158A Dec 27 1927
W B Lee
Clerk US Dist Court
Extension until January thirtieth granted to file record Hardeman versus Witbeck.

OAKLEY F DODD Clerk
122OP

Filed Dec. 27, 1927.

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83 SUPERSEDEAS BOND.

(Title Omitted.)

Know all men by these presents:

That we, Albert T. Witbeck, as principal and Southern Surety Company as surety, are held and firmly bound unto and in favor of Jack Hardeman, appellee in the above cause, in the full sum of One Thousand Dollars ($1,000.00) for the payment of which, well and truly to be made, we bind ourselves, our successors and legal representatives, firmly and in solido by these presents.

Dated Shreveport, Louisiana December .... 1927.

The condition of the above obligation is such that, whereas, on the .... day of November, 1927, in the District Court of the United States for the Western District of Louisiana,

in a suit pending in that Court wherein Jack Hardeman was plaintiff and Albert T. Witbeck was defendant, numbered 227 on the Equity docket, a decree was rendered and signed against Albert T. Witbeck; and the said Albert T. Witbeck having obtained an appeal, with supersedeas, to the United States Circuit Court of Appeals for the Fifth Circuit:

Now, if the said Albert T. Witbeck shall prosecute such appeal with effect and answer all damages and costs if he fails to make his appeal good, then the above obligation is to be of no effect; otherwise to be and remain in full force and effect.

ALBERT T. WITBECK,
By S. L. HEROLD, Atty.,
SOUTHERN SURETY COMPANY,
By A. C. BODENHEIMER,
Agent and Attorney-in-fact.

(Seal)

Approved:

BEN C. DAWKINS,
United States District Judge.

Filed Jan. 7, 1928.

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84 MINUTES OF THE COURT.

United States District Court Western District of Louisiana.

Shreveport, Louisiana, October 23, 1925.

Court met pursuant to adjournment.

Present: Hon. Ben C. Dawkins, Judge, Presiding, and other Court Officials.

Jack Hardeman
vs. No. 227, in Eq.
Albert T. Witbeck.

Upon motion of Mr. S. L. Herold
It was ordered that the motion to dismiss be fixed for Friday, October 30th.
Ordered that Court adjourn.

Shreveport, Louisiana, Friday, October 30, 1925.

Court met pursuant to adjournment.
Present: Hon. Ben C. Dawkins, Judge Presiding, and other Court Officials.

Jack Hardeman
vs. No. 227, in Eq.
Albert T. Witbeck.

The motion to dismiss was taken up and argued and submitted, and taken under advisement by the Court—briefs to be filed by next Wednesday.
Ordered that Court adjourn.

Shreveport, Louisiana, Monday, October 11, 1926.
Court met pursuant to adjournment.
Present: Hon. Ben C. Dawkins, Judge Presiding, and other Court Officials.

Jack Hardeman
vs. No. 227, in Eq.
Albert T. Witbeck.

Upon motion of Mr. Cousin, of counsel for defendant, and by agreement of Mr. Grimmet, attorney for plaintiff,

It was ordered that this case be fixed for trial for Tuesday, October 26th.

Ordered that Court adjourn.

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85 Shreveport, Louisiana, Tuesday, October 26, 1926.

Court met pursuant to adjournment.

Present: Hon. Ben C. Dawkins, Judge Presiding, and other Court Officials.

Jack Hardeman
vs. No. 227, in Eq.
Albert T. Witbeck.

By agreement of counsel,

It was ordered that the fixing of this case for this date be upset, the case to be reset later for a date to be agreed upon by counsel.

It was thereupon ordered that Court adjourn.

Shreveport, Louisiana, Thursday, March 17, 1927.

Court met pursuant to adjournment.

Present: Hon. Ben C. Dawkins, Judge Presiding, and other Court Officials.

Jack Hardeman
vs. No. 227, in Eq.
Albert T. Witbeck.

The plaintiff, through his counsel objected to and moved to strike out the motion to dismiss for want of jurisdiction filed herein by the defendant on March 16th, which objection was overruled and the said plea to jurisdiction ordered filed and referred to the merits. Whereupon, this case came on for trial according to previous assignment before the Court, the plaintiff being present and also represented by his attorneys Messrs. Pugh, Grimmet & Boatner, and the defendant being present and also represented by his attorney, Mr. S. L. Herold. The case was stated to the Court by Counsel and evidence on behalf of both the plaintiff and the defendant offered, adduced and concluded, and the evidence closed, the case to be argued later, after the evidence is transcribed, at a date to be agreed on by counsel.

Ordered that Court adjourn.

Shreveport, Louisiana, Monday, June 20, 1927.

Court met pursuant to adjournment.

Present: Hon. Ben C. Dawkins, Judge Presiding, and other Court Officials.

Jack Hardeman

vs. No. 227, in. Eq.

Albert T. Witbeck.

On motion of Mr. Sidney L. Herold, attorney for defendant,

It was ordered that this case be fixed for argument for tomorrow morning at ten o'clock.

Ordered that Court adjourn.

86 Shreveport, Louisiana, Tuesday, June 21, 1927.

Court met pursuant to adjournment.

Present: Hon. Ben C. Dawkins, Judge Presiding, and other Court Officials.

Jack Hardeman
vs. No. 227, in. Eq.
Albert T. Witbeck.

This case was taken up and argued and submitted, and taken under advisement by the Court, briefs to be filed within twenty (20) days.

It was thereupon ordered that Court adjourn.

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87 PRAECIPE.

(Title Omitted.)

The Clerk will please make up the transcript of appeal in the above case as follows, to-wit:

1. The original bill of complaint.
2. Motion to dismiss.
3. Motion to dismiss for want of jurisdiction.
4. Answer of defendant and exhibits attached.
5. Opinion of the Court overruling motion to dismiss. Filed March 11, 1926.
6. Summary statement of the evidence.
7. Opinion of the Court of date November 15, 1927.
8. Final decree.
9. Assignment of errors.

10. Petition and order of appeal.
11. Appeal bond and approval.
12. Citation of appeal and return.
13. This praecipe.
14. Clerk's certificate.

THIGPEN, HEROLD, LEE & COUSINS,
Attorneys for Defendant-Appellant.

Filed Jan. 19, 1928.

CLERK'S CERTIFICATE.

I, W. B. LEE, Clerk of the District Court of the United States for the Western District of Louisiana Fifth Circuit, do hereby certify that the foregoing eighty-seven (87) pages contain and form a full, true, correct and complete transcript of the record, assignment of errors and all proceedings had and evidence adduced in a cause entitled Jack Hardeman vs. Albert T. Witbeck, No. 227 on the Equity Docket of said Court, as fully as the same remains on file and of record in my office at Shreveport, Louisiana, the said transcript having been prepared in accordance with praecipe filed by counsel, a copy of which praecipe is embodied in the trnscript.

Witness my official hand and the seal of this Court at the City of Shreveport, Louisiana, on this the 26th day of January, A. D. 1928.

W. B. LEE,
Clerk.
By MINA E. HOLT,
Deputy Clerk, U. S. Dist. Court, West. Dist. of Louisiana.

(Seal)

That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:—

ARGUMENT AND SUBMISSION.

Extract from the Minutes of March 18th., 1931.

ALBERT T. WITBECK,

No. 5258 versus

JACK HARDEMAN.

On this day this cause was called, and, after argument by S. L. Herold, Esq., for appellant, and J. M. Grimmet, Esq., for appellee, was submitted to the Court.

OPINION OF THE COURT FILED—July 17th., 1931.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

NO. 5258.

ALBERT T. WITBECK,

Appellant,

Versus

JACK HARDEMAN,

Appellee.

Appeal from the District Court of the United States for the Western District of Louisiana.

S. L. Herold, (Thigpen, Herold & Cousin on the brief), for Appellant.

J. M. Grimmet, (Yandell Boatner, J. M. Grimmet, Frank J. Looney, and Pugh, Grimmet & Boatner on the brief), for Appellee.

Before FOSTER, SIBLEY and HUTCHESON, Circuit Judges.

SIBLEY, Circuit Judge:—

Witbeck and Hardeman each desired to prospect for gas and oil under Section 13 of the Leasing Act of February 25th, 1920, 30 U. S. C. A., §221, upon a certain quarter section of land in Louisiana belonging to the United States, both being qualified under the Act to do

so. Witbeck made oath to his application for a permit on November 9th, 1923, and mailed it with the required fees. It was marked "Received" at the land office at 3:30 P. M., November 12th, 1923. Hardeman went on the land on Sunday, November 11th, 1923, and made a monument and posted a notice thereon, as mentioned in §221, to obtain a preferential right to a permit for thirty days, and on December 11th, 1923, his unsworn application for a permit was received by mail at the land office, but without the fees which were required by the regulations of the Department. A contest between the two applications was had in the Land Department upon issues of law and fact, with appeals and rehearings, resulting finally in a revision of the matter by the Secretary of the Interior, who awarded the permit to Witbeck. Before the permit issued, Hardeman brought his bill in the Supreme Court of the District of Columbia against the Secretary and Witbeck, seeking to enjoin the issuance of the permit to Witbeck, and to judicially establish his own prior right thereto. Witbeck was not served, and the bill was dismissed "for want of jurisdiction". Afterwards, on May 6th, 1925, Witbeck got his permit, and gave the bond required of him. Hardeman brought the present bill in equity against Witbeck alone, asserting that he, and not Witbeck, was entitled to the permit, and that Witbeck had been awarded it in consequence of an error of law on the part of the Secretary of the Interior, and praying a decree that he is the equitable owner of the permit, and that Witbeck is only a trustee for him, and that Witbeck assign the permit to Hardeman. Witbeck moved to dismiss the bill for want of equity, and also because it concerns property the title to which is

still in the United States, and because the United States are an indispensable party and cannot be brought in without their consent. The first motion was overruled, and the second and third reserved for consideration on the merits. After trial, they were impliedly overruled, for a decree was granted Hardeman in all respects as prayed for. Witbeck appeals. The permit has been kept in life by an extension pending the litigation.

Witbeck's first assignments of error are upon the overruling of his motions to dismiss. It is first contended that the bill lacks equity because the grant of a permit to anyone is discretionary, so that no one can complain at not getting it. The language of the statute, 30 U. S. C. A., §221, is: "The Secretary of the Interior is *authorized* under such necessary and proper *rules and regulations* as he may prescribe to grant to any applicant qualified . . . a prospecting permit". Regulation 2, 47 Land Decisions 437, declares: "It should be understood that under the Act the granting of a prospecting permit for oil and gas is discretionary with the Secretary of the Interior, and any application may be granted or denied either in part or entirely as the facts may be deemed to warrant." If the grant be wholly discretionary, the preferring of a competitor cannot be complained of, because the complainant can show no certain right in himself had the competitor been refused, notwithstanding the Secretary may have given bad reasons for his action. Anicker v. Gunsberg, 246 U. S. 110. But we think the language of §221 in reference to the applicant who goes upon the land and erects the monument and posts the required notice that "he shall during the period of thirty

days following such marking and posting be entitled to a preference right over others to a permit for the land so identified" cannot be so easily nullified. Regulation 5 recognizes this preference, and declares that priority in initiating the claims shall govern in case of conflict. The Secretary has discretion to decide whether particular land shall be withdrawn from exploitation, and may refuse all applications for permits to explore it. United States ex rel McLennen vs. Wilbur, Secretary, 283 U. S. . But having decided that the land shall be exploited, he must recognize the statutory preference in issuing the permit, there being no discretion to ignore this plain mandate of the law. Daniels v. Wagner, 237 U. S. 547.

It is next urged that Witbeck has nothing that he can assign, but has only a contract with respect to land belonging to the United States which cannot be remodeled by a court, even if it ought to be, without the presence of the United States as a party. The bill is framed after the likeness of those often entertained in reference to patents under the land laws prior to the Leasing Act here involved. Daniels vs. Wagner, *supra*, is an example. In that case the question of the indispensability of the United States as a party was raised, but at page 567 was dismissed as too obviously without merit to deserve discussion. The reason is that in such cases the courts refuse to interfere until the Land Department has done its work and issued a final patent, thus ending the proprietary interest of the United States in the land and making the contest over it a matter of private interest only. Johnson v. Towsley, 13 Wall. 72;

Marquez v. Frisbie, 101 U. S. 473; Cosmos Exploration Co. v. Gray Eagle Oil Co., 190 U. S. 301. Under the Leasing Act the land of the United States is not to be conveyed by patent, but leased, so that the proprietary interest of the United States in the land never ceases. Nevertheless, the lease is the final action of the Land Department in disposing of the land, and in this respect is analogous to a patent. The general powers of the Land Department in administering this law are just such as are exercised in administering other land laws, and exactly the same necessities exist for judicial review of frauds on or in the Department, or mistakes of law, or excesses of the limits of authority, as arose in reference to the grant of patents, and similar remedies ought to apply. Furthermore, since a mere permit to prospect for oil or gas under 30 U.S.C.A., §221, is exclusive, and in case of discovery carries the right to take the oil and gas found at a royalty of 20% until a lease is applied for, §224, and to lease for twenty years 160 acres, or one-fourth of the land prospected, at a royalty of 5%, with a preference right to lease the whole land at a royalty to be fixed under Regulations, §223, the permit may be of as much value and importance as the lease which it controls. The permit is itself an act of the Land Department, final so long as it lasts, and though in its inception a mere license conveying no estate in the land, it is a final grant of a valuable right pursuant to law which ought to be secured to the person to whom the law gives it. Judicial inquiry concerning this right cannot be delayed until the permit is executed by the permittee's making the required expenditures, and by his making discovery and obtaining a lease, for it would be

most inequitable then to substitute another lessee for the permittee. A just remedy for a wrong award of the permit should be applied prior to the issuance of the permit or promptly thereafter. In deference to the authority of the Land Department the courts have always refused to interfere until it has exercised its function, or has refused to do so. When that function is to issue a patent, no interference has been allowed until the patent issues. Marquez v. Frisbie, 101 U. S. 473; Brown v. Hitchcock, 173 U. S. 473; Cosmos Exploration Co. v. Gray Eagle Oil Co., 190 U. S. 301; Humberg v. Avery, 195 U. S. 480. We assume that it was for this reason that Hardeman's bill in the Supreme Court of the District of Columbia against the Secretary for an injunction was dismissed. That bill strongly presented the reasons why the remedy it proposed was to be preferred over that here sought, whose difficulties now under discussion were foreseen. That the permit is a perishing thing, unable to outlast a long litigation, is another reason for settling whose it shall be before it issues. But it being apparently established that injunction is unavailable, we think the remedy here sought when invoked without laches is to be allowed. It has been applied to leases and permits under the Leasing Act without question. Isaacs v. Dehon, 11 Fed. (2d) 943. In Hodson v. Federal Oil & Development Co., 5 Fed. (2d) 442, the question was raised that the United States were a necessary party, but it was not decided either by the Circuit

Court of Appeals or by the Supreme Court on appeal to it, 274 U. S. 15, both courts dealing only with the merits. It is true that neither lease nor permit ends the interest of the United States in the land involved. If the court were undertaking to dispose of the land to the injury of the United States, they would be an indispensable party. Louisiana v. Garfield, Secretary, 211 U. S. 70; Goldberg v. Daniels, Secretary, 231 U. S. 218. And in so far as lease and permit are contracts, neither could be cancelled or reformed without all parties to them being before the court. Shields v. Barrow, 17 How. 130; Ribon v. Railroad Companies, 16 Wall. 446; Kindig v. Dean, 7 Otto 423; Vincent Oil Co. v. Gulf Refining Co., 195 Fed. 434. But looking at the substance of the matter, we think that the disposition of the land has already been made by the action of the Secretary in issuing a permit on the terms fixed by the law and the regulations. No other or different disposition is now proposed to be made, and no term of the contract is to be altered. A change of permittee is alone to be effected. This would be a most important matter in contracts, permits or leases where the person to be dealt with could be freely chosen or rejected. But here the law makes the choice, and the question is whether the Secretary by mistaking the law has given the contract to someone other than the one chosen and intended by the United States, speaking through the Congress. The court but succeeds to the Secretary in identifying that choice. The only real interest of the United States lies in having their will as expressed in their laws carried out, and this is not a proprietary interest that will be adversely affected by the transfer proposed.

It is again objected that the lease is expressly made unassignable without the consent of the Secretary, 30 U.S.C.A., 187, and the permit being a personal license is in its nature nontransferable, but is by Regulation 12½, 47 Land Decisions 437, made assignable to qualified persons, but only on first obtaining the consent of the Secretary. This restriction on transfer applies to voluntary transfers, and will hardly be deemed applicable in case of death, bankruptcy or court decree. But the difficulty is met by the just assumption that the Secretary intends that leases and permits shall go to those whom the law entitles to them, and when a transfer is ordered to accomplish this his consent is to be implied, and may be compelled if refused. If such a transfer be decreed, he will no doubt, on request, enter his consent thereto, and make necessary substitution of bond, and do all else that is appropriate to perfect the transfer. We therefore affirm the judgment which retained the bill for trial.

Upon the merits of the case we think the law is with Witbeck. His application for a permit was filed November 12th, 1923, perfect in form and substance, and accompanied by required fees. Hardeman's was filed December 11th, 1923. Conceding that he was entitled to preference by having on November 11th gone upon the land and posted notice of his intention to apply, the preference lasted only for the thirty days next following, 30 U.S.C.A., §221, and was lost unless a lawful application was filed within that time. The application he filed was not sworn to, and was accompanied with no fees. The fees were paid on demand December 19th,

1923, and the oath was offered to be supplied in 1925, long after the thirty days had expired. For lack of oath and fees, the Secretary denied Hardeman the preference. The fees to be paid in connection with an application for a permit were fixed by the special regulations made under 30 U.S.C.A., 189, which were known to Hardeman. Payment with the application was not expressly required by them, but was made a condition of filing all applications and declarations by paragraph 8 of Circular 616, 46 Land Decisions 513, of general application in the land office, but unknown to Hardeman. The application was in fact filed, and the filing never expunged, and the fees were paid on notification. We should hesitate to nullify the application on this ground. But the oath to the application was required by the statute itself, 30 U.S.C.A., 190, and by the special regulations made under it. Numerous facts were required to be stated in the application, in addition to the important fact of posting the land. An application lacking an oath was no more one in compliance with law than a tax return having such a defect, Lucas v. Pilliod Lumber Co., 281 U. S. 245, or an unsworn application for a patent. Steward v. American Lava Co., 215 U. S. 161. An attachment when required by law to be founded on an oath is void without it. Cohen v. Manco, 28 Ga. 27; Tacoma Grocery Co. v. Drahan, 8 Wash. 263; 4 Cyc. 470. Hardeman testified at the trial that he did in fact swear to the application at the same time that the affidavit which is mentioned in it as attached, and which showed Hardeman's age and citizenship, was executed by his father. This, if true, occurred at a distance from the land office. The application disclosed no unsigned form of oath, or other indica-

tion that its contents were sworn to or intended to be. By requiring it and all other statements to the Secretary to be upon oath, and in such form and upon such blanks as he may require, we think the statute, §190, intended written papers and an oath disclosed by the paper filed, so that the Secretary and the interested public could know by inspection whether the requirement had been complied with. No other construction of the statute is practicable, for otherwise there would be intolerable uncertainty, and a penalty for perjury would be hard to inflict for want of knowing who had administered the oath, or whether one had been administered at all. Although ordinarily the omission of an oath can be supplied later, when the oath is made a condition of priority or advantage over another the amendment will operate only from its date. Because Hardeman filed no lawful application within thirty days from his posting of the land, he lost his priority right, and the permit was properly awarded to Witbeck.

It was claimed that the award was first made to Hardeman, and that afterwards, without notice to him, it was reconsidered irregularly by the Secretary and reversed. This, it appears, was done in the exercise of the Secretary's supervisory authority, which may be exercised regardless of rules of procedure, and until a patent finally issues. Knight v. United Land Associations, 142 U. S. 161; Love v. Flahive, 205 U. S. 195. No new evidence was taken, or argument heard behind Hardeman's back. The reversal of the decision was on questions of law only, and as to these Hardeman stated his position in a motion for rehearing, and the Secretary in ruling on

this motion reiterated his conclusions. The question under the present bill is not the regularity of the procedure in the Land Department, but is whether the permit was at last issued to the wrong man through error of law. We think it was not, and the decree to the contrary is reversed, with direction to dismiss the bill.

CONCURRING OPINION OF HUTCHESON, CIRCUIT JUDGE, FILED—JULY 20th, 1931.

No. 5258.

ALBERT [redacted] WITBECK VS JACK HARDEMAN

HUTCHESON Circuit Judge, Concurring:

I concur in so much of the judgment as reverses the judgment appealed from. If the Court had a right to consider the case on its merits, I think it plain that it decided it wrongly, for the Secretary's award to Witbeck should have been sustained.

I think, however, that the United States not being a party to the suit and not having parted with title to the land, the case presents no justiciable matter and the judgment should dismiss, not remand, the cause.

Witbeck had nothing which the Court can make him assign, Hardeman claiming not under but adversely to the Witbeck permit. Wilson vs Elk Coal Co. 7 Fed(2d)112.

Quite a different situation is presented where, as in the cases cited in the majority opinion in favor of the jurisdiction, Isaacs vs DeHon, 11 Fed(2d)943; Hodgson vs Federal Oil Co. 5 Fed(2d)442, the plaintiff claimed a right in property, title to which was still in the United States, not adversely to but under the defendant and the object of the suit was to compel him to perform the trust which he had undertaken, to recognize the interest which he had created, or with which he was in privity.

In the Isaacs case the same court which had decided the Wilson case makes this very clear.

> "It is contended that there is a defect of parties in that the Secretary had not been joined * * * It may be that plaintiffs will lose the fruits of this litigation by the refusal of the Secretary to approve the assignment of interests in the permit. *But appellant is nevertheless held in a court of equity to the obligation he assumed in his grubstake contract.* * * * The Secretary of the Interior would not have been a proper party to this suit. * * * Courts do have power

to *enforce contracts with reference to lands* while title thereto is held by the Government."

While in the Hodgson case Judge Stone makes it very plain why there the Court had jurisdiction, and here it would not have.

"Sec. 18 provides that all leases hereunder shall inure to the benefit of the claimant and all persons claiming through or under him. * * * The words "or otherwise" would seem broad enough to cover a claim that the lessor was a trustee * * * If the appellant is, as he alleges, a tenant in common of such property, the right would exist if the property were privately owned in any tenant to exploit it. * * * If the property involved is a part of the public domain and if one of the co-tenants has secured this exclusive right of exploitation, it would seem that an accounting for the net results would not in any wise affect the lessee or the Government. * * * My judgment is that his allegations, if establishing a cotenancy could result only in establishment of a trust relation as to this lease. If this be true * * * I do not see how the Government is interested in or affected by this controversy."

Thus it is seen that in the Isaacs and in the Hodgson cases there was a controversy between persons claiming to be in privity with each other, in which it was sought to establish a trust upon the property in question, not adverse but subordinate to the right held by the defendant.

Here the effort is to strike down wholly the defendant's right, in order to set up an independent right asserted in lands the title to which is still in the United States, not in subordination to but wholly in despite of that right, and in contradiction of the action of the Secretary in the exercise of his discretion in awarding the permit to Witbeck.

It seems plain to me that this case presents an attempt to invoke the jurisdiction of the Court to, in the absence of indispensable parties, do a vain and idle thing.

JUDGMENT.

Extract from the Minutes of July 17th., 1931.

ALBERT T. WITBECK,

No. 5258 versus

JACK HARDEMAN.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court with direction to dismiss the bill;

It is further ordered, adjudged and decreed that the appellee, Jack Hardeman, be condemned to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

"Hutcheson, Circuit Judge, concurring."

PETITION FOR REHEARING—Filed August 6, 1931.

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FIFTH CIRCUIT

No. 5258

ALBERT T. WITBECK,

Appellant,

versus

JACK HARDEMAN,

Appellee.

PETITION FOR REHEARING.

To the Honorable United States Circuit Court of Appeals for the Fifth Circuit:

Now, in the above numbered and entitled cause comes JACK HARDEMAN, petitioner for review herein, and respectfully petitions this Honorable Court to grant a rehearing herein and to set aside that portion of the opinion and decree handed down on July 17, 1931, which held that the application made by petitioner for an oil and gas permit was null and void for the reason that

the jurat of the Clerk of the United States District Court, Western District of Louisiana, who took the oath of your petitioner to said application, was not attached to the application, and to grant your petitioner the full relief prayed for.

The reasons for granting a rehearing is that the Court erred in said opinion and decree as hereinafter specifically shown:

(1)

The Court erred in holding that the application of Hardeman was a nullity on the ground that intrinsic proof of it having been sworn to by Hardeman was not attached to the application. The record discloses the application was in fact sworn to in the office of U. S. Clerk, Shreveport, La., on December 10, 1923, but jurat omitted (R. 121-122). In view of the further fact that *Section 190, Vol. 30, U. S. C. A.* merely provides that an oath be taken when required by the Secretary and Regulation 4 *(47 L. D. 437)* promulgated by the Secretary of the Interior provides no form for application nor for a jurat thereto, but merely provides that the application shall be under oath, it was error to hold the application a nullity.

(2)

The Court erred in holding that the Secretary of the Interior could exercise supervisory authority without complying with the Rules and Regulations formu-

lated and promulgated by the said Secretary for his own guidance in the exercise of supervisory authority. Rule 85 provides that in motions for exercise of supervisory authority before the Secretary of the Interior the same rules shall govern in so far as applicable, as are provided for proceedings before the Commissioner of the General Land Office. These rules require notice to litigants. The Supreme Court of the United States in the case of *Knight v. United Land Association, 142 U. S. page 162 (35 Law Ed., page 974)*, which case is cited by the Court in its opinion held the following:

> "The mode in which the supervision shall be exercised in the absence of statutory direction may be prescribed by such Rules and Regulations as the Secretary may adopt."

The Secretary adopted Rule 85, above cited, and published the same for information of litigants. IT IS NOT A DEPRIVATION OF SUPERVISORY AUTHORITY FOR THE COURT TO HOLD THAT THE SECRETARY IN THE EXERCISE THEREOF MUST CONFORM TO HIS OWN RULES AND REGULATIONS.

(3)

The Court erred in not holding that the contest between Hardeman and Witbeck before the Commissioner of the General Land Office and on appeal before the Secretary of the Interior and the final decision rendered by the Secretary on April 16, 1924, and published

in the *50 L. D., page 413*, was conclusive as to Witbeck and eliminated him in so far as his rights were involved for the reason that issue was joined between Hardeman and Witbeck in a Court of competent jurisdiction and was tried and decided upon its merits without Witbeck raising the point of defective application of Hardeman. Witbeck had his day in Court and lost. This final decision therefore settled the rights of Witbeck. Entertaining this view, the Court erred in not holding that the Secretary had full authority to allow Hardeman to amend his application, and that under the rules and procedure the Secretary should have allowed Hardeman to amend, and in refusing Hardeman he denied him a legal remedy which deprived him of his right.

(4)

The Court erred in holding that the Secretary of the Interior did exercise supervisory authority in this case. In view of the Assistant Secretary's own statement in the opinion (R. 108) which reads as follows:

> "A petition for the exercise of supervisory authority has been filed on behalf of Witbeck, but action thereon is rendered unnecessary because examination of the record has brought to the attention of the Department sufficient to demand reconsideration of appeal."

The Secretary nowhere claims nor does the record support any theory that he exercised supervisory authority, and this was urged by the defendant without

any support from the record. Rule 83 provides that motions for rehearing (which this was) "must be filed within thirty days after receipt of notice of the decision, etc." If upon examination it is allowed, the petitioner must under Rule 83 be allowed fifteen days from receipt of notice within which to serve copy of motion together with all argument in support thereof. There was no compliance whatever with this rule.

(5)

The Court erred in not holding that the final decision of the Secretary of the Interior, dated April 16, 1924, recognizing Hardeman's right to the permit was the law of the case, and that a reconsideration of the case eight months later, without notice to Hardeman, did not affect the decision, and that said decision could not be disturbed until it was proven that Hardeman did not in fact make the required oath to his application. In as much as the proceeding in the Land Department setting aside the decision of April 16, 1924, was not supervisory, and in as much as the action taken therein was illegal and in violation of the Department's own rules, said action did not affect the final decision of the Secretary entered on April 16, 1924.

(6)

The Court erred in denying Hardeman relief in view of the decision of April 16, 1924, decreeing him to be entitled to the oil and gas permit, and in view of the

evidence before this Court that his application was in fact sworn to, which fact made it a valid application, just as was held by that decision.

(7)

The Court erred in not holding affirmatively, in view of the evidence in this case, that Hardeman made the oath to his application required by the regulations of the Secretary of Interior.

YANDELL BOATNER,
FRANK J. LOONEY,
J. M. GRIMMET,
Attorneys for Petitioner.

Of Counsel:
PATRICK H. LOUGHRAN.

I certify that the foregoing application for rehearing is, in my opinion, well founded and not filed for purpose of delay.

Shreveport, La., August 5, 1931.

J. M. GRIMMET,
Attorney for Petitioner.

ORDER DENYING REHEARING.

Extract from the Minutes of August 12th., 1931.

ALBERT T. WITBECK,

No. 5258 versus

JACK HARDEMAN.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

CLERK'S CERTIFICATE.
UNITED STATES OF AMERICA.
UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 145 to 166 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 5258, wherein Albert T. Witbeck is appellant, and Jack Hardeman is appellee, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 144 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 26th day of October, A. D. 1931.

(Signed) OAKLEY F. DODD
Clerk of the United States Circuit
Court of Appeals, Fifth Circuit.

(SEAL)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 7, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(1619)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

JACK HARDEMAN,
Petitioner,

versus

ALBERT T. WITBECK,
Respondent.

No. 503

PETITION FOR CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS AND SUPPORTING BRIEF.

PATRICK H. LOUGHRAN,
Of Washington, D. C.,
Attorney for Jack Hardeman, Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

JACK HARDEMAN,
Petitioner,

versus

ALBERT T. WITBECK,
Respondent.

No. _____

PETITION FOR CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS.

To the Honorable the Justices of the Supreme Court of the United States:

The petition of Jack Hardeman respectfully shows as follows:

That in an equity suit brought by the petitioner in the district court for the western district of Louisiana, the said court decreed that the respondent was a trustee for petitioner of all the right, interest, estate and title whatever under a certain permit to prospect for oil and gas which the Secretary of the Interior had issued to the respondent in the exercise of said officer's authority under section 13 of the so-called Leasing Statute of February 25, 1920, c. 85, 41 Stat. 437, 441. The case in the district court is not reported; nor did that court file a written opinion therein; but its order for decree, and the decree, are set out at pp. 129-132 of the record.

That on the respondent's appeal to the Fifth Circuit Court of Appeals the decree aforesaid was reversed in pursuance of an opinion filed on the 17th of July 1931 (Rec. 146). Rehearing was denied by said court, without opinion, on August 12, 1931 (Rec. 166).

THE DETERMINATIVE ISSUE IN THE CASE.

The question of federal law in the resolution of which the two courts below disagreed is this: Is an application for a prospecting permit under section 13 of the so-called Leasing Statute "a mere nullity", and therefore not amendable, if without intrinsic proof that it had been executed under oath? The trial court answered that question in the negative. The appellate court below answered it in the affirmative. (Rec. 155). Although in so doing the appellate court aligned itself with the Department of the Interior in the conclusion that the respondent and not the petitioner was entitled to a permit to prospect a certain tract of land in the State of Louisiana, for oil and gas, it reached that conclusion by a process of reasoning utterly inconsistent with the reasoning to the same conclusion by the Department of the Interior. That department so concluded upon the assigned ground that a fee did not accompany the petitioner's application when filed. (Rec. 110 and 117). The appellate court below held that such a ground was an untenable one for such a conclusion. (Rec. 154). The Department of the Interior has decided that an application for a permit which is without intrinsic proof that it had been sworn to when filed may be so amended as to show that an oath thereto had been made before filing. (Allen v. Pilcher, 51 L. D. 285). But

the appellate court below held that such an administrative construction of the so-called Leasing Statute is not "practicable". (Rec. 155).

If the Interior Department was sound in its reasoning to its conclusion that petitioner's application was "a mere nullity" because it was not accompanied with the required fee when it was filed, it is unimportant that it reached that conclusion after it had rendered a decision which sustained the petitioner's applications as against the respondent's conflicting application, and declared such decision final (Rec. 85-90, especially at p. 90). In such event it would also be unimportant that such conclusion was reached upon an ex parte proceeding by the respondent and without any previous notice whatever thereof to the petitioner (Rec. 9 [par. XVI of bill], 106 and 122). But if such administrative reasoning was unsound, it was also unsound to have allowed respondent to reopen the case in the Interior Department for a hearing on questions waived by him through failure to urge or even notice them before the General Land Office or on the appeal from that office to the Secretary. In this connection there is an apt passage in the opinion of the Ninth Circuit Court of Appeals in *Mancke v. United States, 38 F. (2d) 624.*

While it is very probable that the provisions of section 763 of Title 28, USCA, as construed in the *Manke* Case, were regarded by this Court as construed correctly, and, therefore, certiorari was denied on October 13, 1930 (No. 187, October Term, 1930), nevertheless it is believed that this Court regarded as a sound exposition of law,—and will regard as pertinent in the instant case,—the fol-

lowing excerpt from the opinion delivered by Circuit Judge Dietrich in the *Mancke* Case, to wit:

> "For obvious reasons a pleading with a defective verification, or none at all, should not be treated as a nullity. One who goes to trial, apparently upon the theory of issues duly joined, will not afterwards be heard to say that there were no issues, merely because an answer, otherwise sufficient and in due form, is not properly verified. See Arrington v. Tupper, 10 Cal. 464; Chalmers v. Sheehy, 132 Cal. 459, 64 P. 709, 84 Am. St. Rep. 62; Hill v. Nerle, 29 Cal. App. 473, 156 P. 981; In re Spinks Drug Co. (D. C.) 298 F. 307; Eckerson v. Tanney (D. C.) 235 F. 415; Griswold v. Bacheller (C. C.) 77 F. 857."
>
> See also *31 Cyc. 732.*

STATEMENT AS TO JURISDICTION.

The jurisdiction invoked by the petitioner is that conferred by section 240 (a) of the Judicial Code, as amended by the act of February 13, 1925, c. 229, 43 Stat. 936, 938. Other requirements of paragraph 1 of the 12th of the rules of this Court are met by the statements of fact set out hereinbefore. The only remaining requirement of the said paragraph is inapplicable because of the absence of any substantial question as to jurisdiction by certiorari.

SUMMARY OF THE MATTER INVOLVED.

The uncontested factual considerations on which the case was presented and determined in the courts below are these:

November 11, 1923 the petitioner fulfilled the conditions precedent to the acquisition of the "preference right

over others to a permit" which section 13 of the so-called Leasing Statute, supra, defines and which lapses or terminates through failure to apply for a permit within thirty days immediately following fulfillment of the conditions. December 11, 1923 the petitioner filed an application for permit in exercise of such right. The application had in fact been executed under oath by the petitioner but did not contain intrinsic proof of having been so executed. (Rec. 13, 80-82, 121). The fee required by law to be paid in connection with the application was not paid until December 19, 1923. (Rec. 107).

After acquisition by the petitioner of the aforesaid "preference right", and on November 12, 1923, the respondent, without having fulfilled any of the conditions precedent prescribed by section 13 of the statute, and without claiming a preference right under that section, filed an application for a permit to prospect for oil and gas the same land with reference to which the petitioner had acquired a "preference right over others to a permit". The respondent's application, when filed, bore intrinsic proof that it had been executed by him under oath; and when tendered for filing was accompanied with the fee required by law. (Rec. 83-85).

The two thus conflicting applications were the subject of a decision of the General Land Office rendered January 24, 1924. Under such decision the respondent's application was rejected for the stated reason that it asserted a claim junior in right to that asserted by the petitioner under the "preference right" acquired by him (Rec. 82, 83). On appeal by the respondent to the Secretary of the Interior that officer, on April 16, 1924, affirmed the deci-

sion of the General Land Office and declared all proceedings involving the two applications finally closed (Rec. 85-90. Witbeck v. Hardeman, 50 L. D. 413). April 24, 1924 the General Land Office,—in execution of the aforesaid decision of the Secretary of the Interior,—finally rejected the respondent's aforesaid application and declared closed all proceedings involving its conflict with the applicaton by the petitioner. (Rec. 90).

October 28, 1924 there was received in the office of the Secretary of the Interior a letter from the respondent in which he brought to the attention of that officer, for the first time, the facts (a) that the petitioner's application was without intrinsic proof that it had been made under oath, and (b) that "no fees accompanied said application as required." (Rec. 104-105). On the same date the Register of the United States Land Office at Baton Rouge, Louisiana, reported to the Secretary of the Interior, by telegraph, that the fee due from the petitioner under his application was paid on December 19, 1923 (Rec. 106-107). January 3, 1925 an attorney in the District of Columbia, acting for the respondent, filed a petition for exercise of the Secretary's supervisory authority, praying for "vacation of the Departmental decision of April 16, 1924," aforesaid, in favor of the petitioner, (Rec. 106). January 12, 1925 the Secretary of the Interior, in action on such petition, decided (1st) that "his [petitioner's] failure to tender the required filing fee within thirty days from the date of the alleged posting defeated his claim of preference right," and (2d) that respondent's "application is entitled to priority" and declared "vacated" the aforesaid decision

of April 16, 1924 (Rec. 108-110. *Witbeck v. Hardeman* [on Reconsideration], *51 L. D. 36)*.

The statement of evidence under Equity Rule 75 contains this paragraph:

> "Neither Hardeman [petitioner], nor any counsel for Hardeman, nor any one authorized to appear or act on his behalf was ever served with a copy of the aforesaid petition involving the supervisory authority; and neither Hardeman, nor any counsel for Hardeman, nor any one having any authority to appear for Hardeman had any notice of the aforesaid petition, until subsequent to January 12, 1925, and after said petition had been acted upon by the Secretary of the Interior" * * * (Rec. 106. See also Rec. 9, 122 and 123).

That the oversight or inadvertence that caused petitioner's application for a permit to be without intrinsic proof of execution thereof by him under oath, was never called to his attention until notified of the aforesaid decision of the Secretary of the Interior of January 12, 1925. (Rec. 13, 121). Petitioner both moved for rehearing of the case under that decision and adduced proof before the Secretary of the Interior that petitioner's application had in fact been sworn to when filed. Upon such proof the petitioner moved for leave so to amend the application as to cause it to contain intrinsic proof that oath thereto had been made when filed. (Rec. 13, 14, 113, 114). March 5, 1925 the Secretary of the Interior denied both the motion for rehearing and the motion to amend (Rec. 114-119, *Witbeck v. Hardeman, 51 L. D. 37*) concluding thus:

> "Not being accompanied by any part of the filing fee, the application [petitioner's application] was without any force and effect—a mere nullity,

and not subject to any action, after the lapse of 30 days from the date of the alleged posting of notice, which could preserve the claim of preference right."

* * * * * *

* * * "Hardeman [petitioner] could have amended his application after it was filed by making it comply with the regulations, but the right of amendment did not extend beyond 30 days after November 11, 1923, the time within which he could pay the fee required by law and regulations, and without which payment his application was of no effect."

Pursuant to the last of the administrative decisions aforesaid a permit was issued to the respondent on May 6, 1925. The suit to have the respondent decreed a trustee of the permit for the petitioner was brought on May 22, 1925 (Rec. 123-127, 1-18).

REASONS RELIED ON FOR ALLOWANCE OF CERTIORARI.

As stated before, the district court did not file a written opinion. Nor did it file findings and conclusions; its decree having been granted before the effective date of Rule 70½ of the Equity Rules. However, that said court's decree was for the petitioner renders unquestionable that its opinion was that the General Land Office erred in matter of law, with resultant granting to the respondent of a permit to which the petitioner was entitled under a correct application of the pertinent law to the uncontested facts. Which means, of course, that the district court was not in agreement with the Secretary of the Interior that the petitioner's application,—"because not accompanied with any part of the filing fee,"—was "a mere nullity" and hence

not amendable in respect of verification thereof under oath. It may not be a useless repetition to again emphasize that the Interior Department did not ascribe nullity to petitioner's application because it was without intrinsic proof that oath thereto had been made, but that the departmental ruling was that nullity was an effect of non-accompaniment of the application with the requisite filing fee.

The opinion of the appellate court below, although in agreement with the administrative conclusion that the petitioner's application was a nullity, assigns as a reason or ground for the agreement a consideration entirely different from that assigned by the Secretary of the Interior, and holds that the reason or ground assigned by that officer was hardly tenable. In witness of this the following is quoted from that court's opinion:

> "The application was in fact filed, and the filing never expunged, and the fees were paid on notification.. We should hesitate to nullify the application on this ground." (Rec. 154).

And after so disapproving the basis assigned by the Secretary of the Interior for his conclusion that the petitioner's application was a "mere nullity", the appellate court below proceeded to conclude that it was a nullity for another and different reason, to-wit, that the application did not contain intrinsic proof that it had been executed under oath. On that matter the appellate court said:

> "Conceding that he [petitioner] was entitled to preference by having on November 11 gone upon the land and posted notice of his intention to apply, the preference lasted only for the thirty days next following, 30 U. S. C. A., sec. 221, and was lost unless a formal application was filed within that time" * * * "the oath was supplied in 1925, long after

> the thirty days had expired." * * * "the oath to the application was required by the statute itself, 30 U. S. C. A. 190, and by the special regulations made under it." * * * "By requiring it and all other statements to the Secretary to be upon oath," * * * "we think the statute, sec. 190, intended written papers and an oath disclosed by the paper filed" * * * "No other construction of the statute is practicable" * * * "Although ordinarily the omission of an oath can be supplied later, when the oath is made a condition of priority or advantage over another the amendment will operate only from its date. Since Hardeman [petitioner] filed no lawful application within thirty days from his posting of the land, he lost his priority right, and the permit was properly awarded to Witbeck" [respondent].

Whether it is the law,—as declared by the Secretary of the Interior,—that an application for a permit which is not accompanied with the required fee, is "a mere nullity" or whether, as remarked by the Fifth Circuit Court of Appeals, a court should hesitate to concur in and sustain such an administrative declaration of law, are questions of federal jurisprudence of general importance and of special concern to the considerable body of the public that is affected by the discharge of the quasi-judicial functions of the Secretary of the Interior in the administration of the public land laws.

It is a disagreement in a matter of law between a court of high rank in the federal judicial system and a branch of government of high rank in the federal executive department. While such disagreement is evident from the foregoing, it is more evident from the following excerpt from the opinion of the Secretary of the Interior in *Allen v. Pilcher, 51 L. D. 285* (decided nearly a year after ren-

dition of that department's decision in *Witbeck v. Hardeman* (On Reconsideration), *51 L. D. 36*, to wit:

> "It is true, section 33 of the act prescribed: 'that all statements, representations, or reports required by the Secretary of the Interior under this act shall be under oath, unless otherwise specified by him, and in such form and upon such blanks as the Secretary of the Interior may require,' and the Secretary has specified that applications for oil and gas permits shall be under oath although no specific form of application is required. Oil and gas regulations, paragraph 4, Circular No. 672 (47 L. D. 437). The requirement of an oath to an application is, therefore, mandatory and no application is properly allowable unless it is verified by oath and so shown to be. An application under this act is not, however, a nullity or fatally defective because the evidence that it was sworn to does not appear thereon, if the oath was administered and that fact is later satisfactorily shown. The liberal policy of the several States in respect to amendments in judicial proceedings is followed by the Department in so far as amendments do not affect rights (Hiram T. Hunter, 2 L. D. 39). As a general rule where a statute prescribes no specific form of affidavit in proceedings or pleadings that have to be verified by oath, the fact that the oath was administered may be shown by extrinsic evidence and an affidavit, if in fact sworn to at the proper time and before the proper officer, is generally admitted by the courts where no rights are prejudiced. See Corpus Juris, Vol. 2, p. 260, note 52, and American Digest, Century Edition, Vol. 2, p. 45, for cases in point. The omission may have been due to an oversight or inadvertence on the part of a notary public to whom the paper was presented for certification. It is, therefore, within the sound discretion of the Department to permit the same to be shown if such was the fact."

The judicial decision under criticism here is irreconcilable with the aforesaid quasi-judicial decision in *Allen v. Pilcher, supra;* but if the former is not reversed the latter very probably will be observed and followed in the Department of the Interior. It has not been the practice of that department to yield its judgment to the judgment of a circuit court of appeals of the United States on a matter of law which the department regards as settled under its decisions and which, in this instance (i. e. with respect to the ruling in *Allen v. Pilcher, supra*), it has ample cause for conviction is thereby settled not only in consonance with its traditional conception of the law of amendment and the overwhelming weight of judicial authority, but in harmony with the ancient spirit of federal jurisprudence. (Section 32 of the original judiciary act).

In the light of the foregoing it would seem unnecessary to urge the less important of the reasons for granting certiorari, namely, that the district court below reached conclusions on matters of federal law diametrically the opposite of those announced by the appellate court below. However, if the latter court erred on the law of amendment of applications for permits to occupy the public lands for the prospecting of them for oil and gas, it would hardly be consistent with the purposes of the optional jurisdiction of this Court under the process of certiorari to permit that error to be perpetuated in the Fifth Circuit and cited with the possibility, at least, of propagation of it in other circuits.

But even if the appellate court below had not erred in its conclusion in the matter of the law of amendment of such applications, its reasoning to its conclusion, if ob-

viously influenced or constrained by authorities cited by it that were not only inapposite but appropriate for citation in support of a contrary conclusion, should not be allowed to stand unrevised or uncorrected by this Court. The interests of general jurisprudence would seem alone sufficient to induce this Court to revise or correct.

THE RATIONALE OF THE DECISION OF THE APPELLATE COURT BELOW.

The Fifth Circuit Court of Appeals clearly indicated that it was impelled to its conclusion that the petitioner's application was a nullity by what appears in section 33 of the so-called Leasing Statute and the 4th of the administrative regulations thereunder. (Oil and Gas Regulations, *47 L. D. 437, 438*). But in *Allen v. Pilcher, supra*, the Department of the Interior considered both that section and that regulation and reached a wholly different conclusion. The said section provides:

> "that all statements, representations, or reports required by the Secretary of the Interior under this act shall be upon oath, unless otherwise specified by him." * * *

The said regulation "specified" that any application for a permit "be under oath." However, the section of the statute that is creative of the "preference right," namely, section 13, neither expressly nor by necessary implication requires, as a condition precedent to the validity of an application filed with view to exercise and enjoyment of the right, that it shall be under oath. The section is without any reference whatever to an oath. And neither the 33d section, nor the 4th of the regulations, contains

any language indicative of a purpose to create any condition precedent whatever to the validity of an application so filed.

But it cannot fairly be said of the opinion of the appellate court below that therein there is an ascription to Congress of an intention to delegate to the Secretary of the Interior an authority to prescribe a condition precedent to the validity of the means,—an application,—which it prescribed as the only means whereby the "preference right" could be exercised. A *sine qua non* of validity of a pleading,—and an application for a permit to prospect is a pleading in a public land proceeding,—may be created by the law-making power, but such power is not competent to delegate authority to the Secretary of the Interior to create it. Hence the aforesaid 4th administrative regulation need not further be noticed.

And so, and necessarily, the opinion of the appellate court below is simply to the effect,— contrary to the effect of the opinion of the Department of the Interior in *Allen v. Pilcher, supra*,—that section 33 of the statute is not construable otherwise (the court said "no other construction of the statute is practicable," (Rec. 155) than that it rendered an oath to an application a condition precedent to the validity of the application, a *sine qua non* of its existence as a valid application. The corollary is, of course, that something null and void in law is not amendable.

It is true, of course, that a quasi-judicial discretion to allow amendments of pleadings in public land proceedings is vested in the Department of the Interior. But it does not follow from that proposition that an abuse of that

quasi-judicial discretion is not subject to correction by the judiciary when it is patent that its effect has been to deny a just claim of right under the law of the land. An unregulated power of discretion is non-existent in government under the Constitution and to allow amendments is the rule; to refuse them, the exception.

Neither the appellate court below, nor the trial court, nor the Department of the Interior, indicated doubt or question concerning the complete verity of the sworn and corroborated testimony of the petitioner that he had in fact been sworn to his application when filed. Throughout both the administrative and judicial proceedings in the controversy between the petitioner and respondent it was virtually admitted that such was the case. But the appellate court below regarded that unquestioned proposition of fact as immaterial, and did so with entire justification if it indeed be the law,—as otherwise held in *Allen v. Pilcher*, *supra*, however,—that section 33 of the statute requires that an application to exercise and enjoy the "preference right" be held to be "a mere nullity" unless within 30 days from acquisition of the "right" the application bears intrinsic proof of having been executed under oath.

Error in the decision of the appellate court below is specified as follows:

I. Error in deciding that the petitioner's application for a permit was a nullity because it was without intrinsic proof of having been executed under oath.

II. Error in deciding that the petitioner's application was not amendable to show the fact that it had been executed under oath when filed.

III. Error in failing affirmatively to decide that the validity of petitioner's application was unaffected by the fact that the fee required to be paid thereunder was not paid until December 19, 1923.

IV. Error in reversing the decree of the district court and in failing to affirm said decree.

WHEREFORE your petitioner prays that his petition for certiorari to the Circuit Court of Appeals for the Fifth Circuit be granted for such proceedings in this case by this Honorable Court as to it may seem just.

JACK HARDEMAN,
Shreveport, Louisiana.

By PATRICK H. LOUGHRAN,
Washington, D. C.,
Attorney for Petitioner.

I hereby certify that I have examined the foregoing petition, and in my opinion the petition is well founded, and that the case is one in which the prayer of the petitioner should be granted by this Court.

PATRICK H. LOUGHRAN.

SUPPORTING BRIEF.

The adjudications the appellate court below cited as authorities for its disagreement with the doctrine enunciated by the Department of the Interior in *Allen v. Pilcher, supra,* should be noticed. The first of them is *Lucas v. Pilliod Lumber Co., 281 U. S. 245,* wherein was presented the question whether the period limited by a special statute for the making of a deficiency assessment of income and profits tax begun to run from the date of the filing of an unsworn return which, however, the Bureau of Internal Revenue had relied upon for purposes of audit.

It was admitted by and on behalf of the taxpayer that the return had not in fact been sworn to when filed and that oath thereto was not made until several years after filing. The circumstance not only very sharply distinguishes that case from the instant case in the factual aspects of the two cases but is undoubtedly what justified this Court in permitting to stand without criticism or even express notice the following statement of general law by the Sixth Circuit Court of Appeals in the *Pilliod Lumber Co. Case, (33 F. [2d] 245),* to wit:

> "The statutory requirement that the return should be verified is, of course, made to be observed and is of importance; it does not follow that the document [the return], without the oath, is necessarily for all purposes a complete nullity."

The Pilliod Lumber Co. Case is clearly distinguishable from the instant case for other and equally obvious reasons. There the question was as to when a period of limitation had begun to run. But there never has been a question in the instant case as to when the period limited

for the filing of the petitioner's application for a permit began to run. All that this Court decided in the Pilliod Lumber Co. case was that a statute limiting the period for action by the United States to recover what was due to it, is effective as an abridgment of a power of government and must, therefore, not be so construed as to enlarge or extend the abridgment. This is evident from the following quotation from the opinion in the case:

> "Under the established rule a statute of limitation runs against the United States only when they assent and upon the conditions prescribed. Here the assent that the statute might run was conditioned upon the presentation of a return duly sworn to."

No interest of the government is involved in the question whether a pleading in a quasi-judicial proceeding *inter partes* may be so amended as to show that it was in fact sworn to before it was filed.

To attempt to analogize the principles governing in the construction of a statute of limitation of the time of action by the United States for the assessment of a tax, to the principles underlying the law of amendment of a pleading in a quasi-judicial proceeding, is plainly to attempt to discover a similitude between things which all jurisprudence has rendered utterly dissimilar. It is axiomatic that a statute that limits or abridges the power of government to assess or to collect a tax, must be strictly construed. On the other hand it is a familiar truism that the law of amendment of pleadings filed with view to exercise and effectuation of the right of a person under the law of the land, must be liberally construed.

The alleged authority next in order of citation of authorities in the opinion of the appellate court below is *Steward v. American Lava Co., 215 U. S. 161.* That case involved a patent for an invention which was a different invention from that disclosed in the application. The fact that there had been issued a patent for something not disclosed in the application, was due to oversight or lack of understanding in the Patent Office in connection with a so-called amendment of the application. If the petitioner in the instant case had attempted to obtain under an amendment of his application for a permit something entirely different from a permit, e. g., a desert land entry, the American Lava Co. Case would be in point. A new and different objective under the application would have rendered necessary what this Court held to be indispensably necessary in the case cited, namely, another and new oath. But the petitioner in the instant case never sought, wittingly or unwittingly, by amendment or otherwise, to obtain under his application anything different from or unlike that referred to therein. Therefore, the decision of this Court in the American Lava Co. Case is pointless here.

The other putative authorities cited in the opinion of the appellate court below are even more inapposite. *Cohen v. Manco, 28 Ga. 87,* was decided in 1858. Therein was considered the question whether the absence of the signature of the plaintiff from what the court denominated a purported affidavit in support of an attachment, rendered the affidavit invalid. Notwithstanding, that there was a completed certificate by a notary public that the plaintiff had appeared before him and been sworn, it was decided that a document defective to that extent was not

amendable. Such a conclusion is typical of injustice perpetrated judicially. It is a conclusion that is inharmonious with the spirit of the law of amendment, besides being, as we shall show presently, antagonistic to the reasoning in an alleged authority cited by the appellate court below which might better have been cited on behalf of the petitioner.

In its citation of *Tacoma Grocery Co. v. Drahan, 8 Wash. 263*, the appellate court below relied upon a case enunciating a principle upon which petitioner might well rely. Therein it was decided that a sale of land under an execution was a "nullity" for a reason that the court that rendered the judgment pursuant to which the execution issued had not acquired jurisdiction. The holding that there was want of jurisdiction was predicated upon the fact that the attachment the plaintiff had sued out was not based upon an affidavit, but upon "a paper" * * * "in the form of an affidavit, signed by a person who represented himself as the attorney for the plaintiff, but there is nothing upon the face thereof to show that it was ever sworn to."

The Chief value of the Tacoma Grocery Company Case to the petitioner lies in the circumstance that the Supreme Court of Washington **decided** therein that it was competent for the plaintiff in the proceeding to quiet title to show, and for the lower court to have accepted the showing if deemed sufficient, that an oath had in fact been made to "the form of an affidavit" in support of the attachment and, upon such showing, to have sustained claim of title. This interpretation by us of the opinion in the Tacoma Grocery Co. Case is amply supported by

statements therein which we shall quote. But before doing so we call attention to the fact that the Washington Supreme Court declared *Wiley v. Bennett, 9 Bart. 581* and *Stout v. Folger, 34 Iowa 71*, distinguishable from the Tacoma Grocery Co. Case only because "there it was made clearly to appear to the court that the affidavit had been in fact sworn to, and it was held that as the required facts had been set forth in the form of an affidavit, and their truth vouched for by the oath of the party, he should not be deprived of his rights by reason of the inadvertent omission of the officer to sign the jurat."

It is evident from the following statements in the opinion in the Tacoma Grocery Case that if counsel for the company had been as alert and diligent as he should have been he would have adduced, if available, the evidence which the court held would have rendered the *Wiley* and *Stout* Cases apposite, and obtained an adjudication the opposite of the one made:

> "There is a point made in the appellant's brief that it should be relieved from the judgment by reason of the fact that it asked for an adjournment of the taking of proofs before the referee for the purpose of allowing it to produce, at the adjourned day, a witness to prove that the affidavit was in fact sworn to, and that the referee refused to grant such an adjournment. If the appellant had sought relief from the action of the referee by a sufficient showing before him and in the lower court upon the presentation of his report, and had been unable to obtain it, the court could grant such relief. But nothing of this kind was done" * * * "Upon the report of the referee, the case came before the court for trial; and, if the appellant felt that it had been denied an opportunity to introduce such proofs as

were necessary before the referee, it should have asked leave to introduce the same upon the hearing."

And so, and plainly, the Tacoma Grocery Co. Case, *supra*, is authority for the proposition that the Supreme Court of Washington would have granted "relief" if the lower court in that case had improperly refused to receive proof that the affidavit in the attachment proceedings had been sworn to when filed. The petitioner is content to abide the ruling made in that case under any accurate interpretation of the opinion filed therein.

The final one of the citations in the opinion of the appellate court below is *4 Cyc. 470.* The subject there treated is "Attachment". Under our view of the topic of jurisprudence which is germane to the question in the instant case, in which view we are convinced this Court will readily concur, we respectfully submit that any matter *at page 470 of 4 Cyc* is pointless and irrelevant, *a fortiori* when it is considered that at pages *522, and 523 of 4 Cyc* there appears the following statement in the text concerning affidavits in attachment:

> * * * "Errors in the date may be corrected or an affidavit newly dated substituted for one erroneously postdated, and the omission of affiant to affix his signature or a defective verification may be amended. If the contents of the affidavit be duly sworn to, but the officer who administered the oath neglects to add his certificate or signature he may be permitted to do so nunc pro tunc" et cet.

What has gone before contains a treatment of each of the so-called authorities relied upon by the appellate

court below. It is the same treatment of them that was made in the petition for rehearing which that court, to petitioner's great astonishment, refused to entertain. Petitioner also set out in such petition for rehearing the excerpt from *Allen v. Pilcher, 51 L. D. 285*, which is embodied in this petition for certiorari. Hence the appellate court below was afforded an opportunity of conforming its final views on the law of amendment of applications for oil and gas prospecting permits to the final views thereon expressed by the officer of the United States charged with the administration of the so-called Leasing Statute. The said court chose to adhere to its views and thereby to create a conflict between it and the Department of the Interior, for determination by this Court.

And the appellate court below has erred so plainly in creating the conflict, that further discussion of the case in the matter of amendment of an application that is without intrinsic proof of execution thereof under oath, is wholly unnecessary in this presence. However, that the appellate court below, and not the Department of the Interior, is sound in judgment on the effect of the brief delay in payment of the fee which the law required to be paid under petitioner's application for a permit, is equally apparent. The appellate court below possibly made a closer study of Cyc with reference to the effect on a pleading of reception and filing of it without payment of a required fee, than was made with reference to that work's treatment of the matter of an oath to papers filed in attachment proceedings. In any event, the ruling of the appellate court below that the Interior Department was wrong in the basis it assigned for its ruling that the petitioner's appli-

cation was "a mere nullity", is at variance with the following excerpt from 31 Cyc at 591:

> "A statute making the payment of a fee a prerequisite to filing a pleading is directory only, and a failure to pay the fee does not render the filing invalid; and the same is true of an order containing leave to file on payment of costs."

THE PREMISES CONSIDERED we submit that cause has been shown for the taking of jurisdiction of the instant case by this Honorable Court under the process of certiorari, and for a decision therein by this Honorable Court reversing the decree of the appellate court below.

Respectfully submitted;

PATRICK H. LOUGHRAN,
Washington, D. C.,
Attorney for the Petitioner.

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Supreme Court of the United States

OCTOBER TERM, 1931

No. 503

JACK HARDEMAN, *Petitioner*

VERSUS

ALBERT T. WITBECK, *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR RESPONDENT.

SIDNEY L. HEROLD
FRANCIS W. CLEMENTS
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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR RESPONDENT.

The decision under review is reported in *51 Fed. (2d) 450.*

On May 6, 1925, an oil and gas prospecting permit was issued to Witbeck by the Secretary of the Interior (R. 123) under the provisions of the Act of Congress approved February 25, 1920 (*41 Stat. 437 et seq.; U. S. Code, Title 30, § 181 et. seq.*). Hardeman, on May 27, 1925, filed his bill in the District Court, alleging that the action of the Secretary in issuing the permit to Witbeck wrongfully ignored prior and superior rights of the plain-

tiff under the leasing statute, praying that he be decreed the equitable owner thereof, and that Witbeck be charged as a trustee for the plaintiff's benefit and ordered to assign the permit to the plaintiff.

ARGUMENT

I.

AS TO JURISDICTION

Title to the land admittedly is in the United States. The very foundation of plaintiff's case is this premise. Witbeck was granted a permit by the Secretary of the Interior. The statute does not *require* the Secretary in any case to grant such permit; it merely *authorizes* (Sec. 13) such contracts to be made by the Secretary, "under such necessary and proper rules and regulations as he may prescribe" (*U. S. Code, Title 30, §221*). The permit involves contractural relations between the permittee and the United States,[1] and, necessarily, the deliberate action of Congress in vesting discretionary power in the Secretary in the matter of the selection of the permittee must be given due weight. Furthermore, the statute (Sec. 30) distinctly prohibits an assignment or subletting without the consent of the Secretary. The issuance of a permit, therefore, in no manner operates the disposition of the Government's title; there is simply a contract entered into, pursuant to the statute and the regulations of the Department, between the Secretary of the Interior and the individual permittee, under which the latter secures rights to operate government-owned land.

[1] Besides the other provisions of the permit, Witbeck was under obligation to furnish bond (R. 128), and did procure and furnish same (R. 130) with surety satisfactory to the Department.

It should be sufficient to dispose of the question of jurisdiction that title to the land and the minerals is in the United States.

It was long ago settled by this Court that "after the United States has parted with its title and the individual has become vested with it, the equities subject to which he holds it may be enforced, but not before."

Marquez vs. Frisbie, 101 U. S. 473;
Bockfinger vs. Foster, 190 U. S. 116;
Humbird vs. Avery, 195 U. S. 480;
Oregon vs. Hitchcock, 202 U. S. 60.

For it will be borne in mind that we are not dealing with a mere possessory right; the litigation is with respect to the superior right of one or the other of the parties to take oil and gas from land which it is conceded is owned by the United States. The suit affects rights in, nor merely to, lands belonging to the Federal Government, and such rights are not justiciable without its consent.

This question is fully discussed in the concurring opinion of Judge Hutcheson in this case. See *51 Fed. (2) 454.*

As pointed out by Judge Hutcheson, it is not necessary to discuss whether the settled Federal decisions referred to in the majority opinion are correct which permit litigation by parties holding under the permittee or lessee of the United States. Certain it is that under the jurisprudence such action cannot be maintained by one claiming adversely to the permittee.

Besides, the object of this suit is to substitute for the permittee selected by the Secretary a person whom the Secretary has heretofore rejected; and thereby to thrust

into a contract made by the duly authorized administrator of Government lands another contracting party with whom the Secretary had refused to deal. In other words, the purpose of this suit is to compel the United States to enter into an oil development contract with a person with whom the Secretary of the Interior has refused to contract, and to deprive the United States of the contractual obligation of the person with whom the Secretary, as the administrator of the public domain, has contracted. A mere statement of the issue demonstrates that the United States is an indispensable party to this proceeding. In such case, of course, the courts have no jurisdiction, unless the United States enter a voluntary appearance.

Louisiana vs. Garfield, 211 U. S. 70;
New Mexico vs. Lane, 243 U. S. 52, 58;
Morrison vs. Work, 266 U. S. 481, 485;
See also *Oregon vs. Hitchcock, 202 U. S. 60;*
Naganab vs. Hitchcock, 202 U. S. 473.

II.

THE BILL STATES NO CAUSE OF ACTION.

It is the established rule not only that a bill to impress a trust because of proceedings in the Interior Department will not lie until complete legal title has left the United States, but also that in no case can the plaintiff recover merely by showing that the defendant was not entitled to patent. It is incumbent upon the plaintiff to show a clear legal right in himself.

In *Bohall vs. Dilla, 114 U. S. 47*, the Court said:

"To charge the holder of the legal title to land under a patent of the United States, as a trustee of another and to compel him to transfer the title, the claimant must present such a case as will show that he himself was entitled to the patent from the government, and that in consequence of erroneous rulings of the officers of the land department upon the law applicable to the facts found, it was refused to him. It is not sufficient to show that there may have been error in adjudging the title to the patentee. It must appear that by law properly administered the title should have been awarded to the claimant."

See also

Lee vs. Johnson, 116 U. S. 48;
Bodley vs. Taylor, 5 Cranch 191;
Sparks vs. Pierce, 115 U. S. 408;
Fisher vs. Rule, 248 U. S. 314.

The only portion of plaintiff's bill, therefore, to be considered by the Court in determining whether it states a cause of action is that part which is relied upon as showing that plaintiff, as a matter of law, was entitled as of right to the permit.

But the statute vests no such *right* in any one.

As heretofore pointed out, the act merely *authorizes* the Secretary, "under such necessary and proper rules and regulations as he may prescribe," to grant a permit. The statute entirely lacks any mandatory direction. It confers *authority* upon the Secretary, not a duty, and that authority is to be exercised under rules and regulations prescribed by the Secretary himself. Section 32 of the act, *U. S. Code, Title 30, § 189,* again vests authority in the Secretary.

> "to prescribe necessary and proper rules and regulations, and to do any and all things necessary to carry out and accomplish the purposes of this Act."

Acting under this delegation of power, the Secretary promulgated the rules and regulations (*47 L. D. 437 et seq.*) Under the heading *"1. Oil and Gas Permit," subsection 2, 47 L. D. 438,* the regulations state:

> "It should be understood that under the act the granting of a prospecting permit for oil and gas is discretionary with the Secretary of the Interior, and any application may be granted or denied, either in part or in its entirety, as the facts may be deemed to warrant."

Since the condition necessary to the maintenance of the bill, to wit, the showing of a *legal right* in the plaintiff, cannot be made in view of the statute and the regulations, it follows that the bill discloses no cause of action, regardless of what mistakes might have been made or what wrongs might have been done in the course of the administrative proceedings referred to in the bill.

Anicker vs. Gunsburg, 246 U. S. 110.

It matters not whether, under the facts stated in the bill, the Secretary erred, or whether Witbeck was or was not entitled to the permit. Plaintiff's case must depend upon a showing that he, *Hardeman, was entitled as of right* to the contract. This he cannot do in view of the fact that the statute and the regulations preclude the acquisition by any one of a legal *right* to a permit in any case.

In *United States ex rel. McLennan vs. Wilbur, 283 U. S. 414, 419,* it was held that such right did not exist: the contention of the Secretary being sustained

> ". . . that under the act, the granting of a prospecting permit for oil and gas is discretionary with the Secretary of the Interior, and any application may be granted or denied, either in part or in its entirety as the facts may be deemed to warrant."

Besides, since the purpose of the bill is to compel the substitution of Hardeman for Witbeck and the assignment by Witbeck to Hardeman, the bill discloses no cause of action, because of the provision in the leasing statute[1] forbidding such assignment without the consent of the Secretary of the Interior, and of the provision in the regulations[2] requiring the consent of the Secretary to the assignment of any permit.

III.

ON THE MERITS

On November 12, 1923 (R. 83), Witbeck filed an application conforming in all respects to the rules and regulations of the Department for an oil and gas permit under Section 13 of the leasing act. This application was sworn to on November 9th, and was accompanied by payment of the fees required by the regulations of the Department.

The plaintiff, Hardeman, filed his application for a permit on December 11, 1923 (R. 80), 29 days after

---

[1] See *section 30 (41 Stat. 449; U. S. Code, Title 30, sec. 187).*

[2] "Permits, after being awarded, may be assigned to qualified persons or corporations upon first obtaining consent of the Secretary of the Interior."
47 L. D. 446.

Witbeck's application had been officially marked filed. Hardeman, however, claimed a preference right because of an unsworn statement made in his application that he had located the land and staked it off in the manner prescribed by the rules on November 11, 1923. The regulations of the Secretary of the Interior, found in *Volume 47 of the Land Decisions, page 437 et seq.*, prescribe the requisites to an application for a permit under the statute. Hardeman's application failed to comply with these regulations in a number of respects; it was accompanied by no jurat as required by the rules, failed to give the three references as to the applicant's reputation and business standing as the rules required, and was not accompanied by payment or tender of any fees, and indeed the notice posted misdescribed the land. The preference right for which Hardeman contended is covered on page 441 of the regulations published in *Volume 47 of the Land Decisions*. Both statute and regulations emphasize the fact that such right is merely one to be preferred over other applicants and which does not confer a legal right against the United States.

The regulations include the standing rules approved August 9, 1918, and contained in Circular 616 (*46 L. D. 513*); paragraph 8 of which provides peremptorily that:

> "Where no money is tendered, the application . . . will be rejected."

Not only does the evidence show, but it is admitted in the bill (R. 4), that Hardeman did not tender the fees with his application. Indeed, it was not until December 19, 1923 (R. 107), long after the expiration of thirty days from the alleged location and taking of possession, that Hardeman did tender the required fees. Moreover, that

Hardeman never made oath to his application was judicially admitted by him in the bill which he filed in the Supreme Court of the District of Columbia (R. 31; R. 57):

> "Said application was executed over the signature of the plaintiff, but was not sworn to by him." (R. 31).

This, then, was the situation: Witbeck applied for the permit on November 12th. Hardeman applied on December 11th. Witbeck's application was in the form and accompanied by the incidents prescribed by the regulations. Hardeman's application lacked the affidavit, lacked the reference, with notice posted misdescribing the land, and was non-receivable because not accompanied by tender of the fees. Hardeman claimed under the regulations a preference right for thirty days from November 11th. Such preference right is only "over others," not against the Government, and is for thirty days only. It was necessary, in order to maintain his asserted preference, that his application should have been properly filed before December 12th. This was not done, and the standing regulations of the Department required the rejection of the application without further ceremony because no fees were tendered. If the local officers had done their duty, they would have refused to file Hardeman's application and would have sent Witbeck's to Washington unopposed for approval.

Contest between Hardeman and Witbeck then resulted. From an adverse decision of the Commissioner of the General Land Office Witbeck appealed to the Secretary of the Interior (R. 85), who, on April 15, 1924, affirmed the decision of the Commissioner (R. 85-90). See *50 L. D. 413.* Protests were then filed by Witbeck with the

Secretary of the Interior, making serious charges against the Hardeman application (R. 91 et seq.), which resulted in the matter being held up in the Interior Department. On November 28, 1924, Witbeck's Washington attorneys entered their appearance (R. 103), requesting that, upon the coming in of the report of the field agent, they be afforded opportunity to examine the record and that action be withheld by the Secretary pending their examination. On January 3, 1925, counsel for Witbeck filed with the Secretary a petition invoking his supervisory power (R. 106), and asking for a readjudication of the matter and a vacation of the decision of April 16, 1924. The Secretary, on examination of the record and from information furnished him by the land office at Baton Rouge, concluded (R. 108) that Hardeman's failure to tender concurrently with his application the fees required by law rendered his application null; that he had not, therefore, filed a legal application within the thirty days during which he might have had a preference; and that Witbeck's application, having been filed in proper form and accompanied by the requisite fees, should be given effect. The Secretary therefore ordered (see *51 L. D. 36*) that the decision of April 16, 1924, be vacated to the extent that it recognized a preference right upon the part of Hardeman, and reversed the decision of the Commissioner of the General Land Office (R. 110). This decision of the Secretary was made on January 12, 1925. Thereafter (R. 110) Hardeman filed a motion for a rehearing, accompanied by assignment of errors and brief. On February 17, 1925, Hardeman's Washington attorneys addressed a communication to the Secretary of the Interior, requesting leave for oral argument in support of his motion (R. 114). The request was granted, oral argument was had on February 27, 1925, the entire case

re-reviewed, and on March 25, 1925, Hardeman's motion for rehearing was denied (R. 114). *51 L. D. 37.* After further correspondence, an order was made on May 6, 1925, closing the case.

On March 9, 1925, Hardeman instituted suit in the Supreme Court of the District of Columbia (R. 26), naming as defendants the Secretary of the Interior, the Commissioner of the General Land Office and the defendant Witbeck. In his bill plaintiff prayed for a restraining order (R. 45) enjoining the enforcing of the Secretary's decision and the issuance of a permit to Witbeck, and for a final judgment perpetuating the restraining order and a mandatory injunction requiring the vacation of the decision complained of (R. 46). This was followed by an amended bill, more fully setting out his cause of action (R. 51). In this bill and amended bill, every complaint made in the present suit is judically advanced. Before service could be made on Witbeck, the Secretary of the Interior and the Commissioner of the General Land Office, on March 18, 1925, moved to dismiss the bill of complaint (R. 50-1), because of its exhibiting no cause of action and because "it clearly appears from the subject matter thereof that the decisions and actions of these defendants were made and taken in the exercise of a function involving their judgment and discretion in a matter committed by the Act of February 25, 1920, exclusively to their jurisdiction." The Supreme Court of the District of Columbia sustained this motion on the ground last mentioned (R. 73), and dismissed the suit; but, instead of prosecuting an appeal from that judgment, the plaintiff ignored it and brought the present suit upon the same cause of action set out in his pleadings in the Supreme Court of the District.

With reference to the contention insisted on throughout

by Hardeman's counsel, that the Secretary's decision finally awarding the permit to Witbeck was unwarranted because of his first decision in favor of Hardeman, we have only to observe that it is settled law that, until the final act of administration is had, the power and duty remains in the Secretary to correct such errors as he or his predecessors may previously have committed.

> "So long as the Department retains jurisdiction of the land, administrative orders concerning it are subject to revision."
>
> *West vs. Standard Oil Co., 278 U. S. 200, 210.*

> "The decision [of the former Secretary] was, not a judgment pronounced in a judicial proceeding, but a ruling made by an executive officer in the exertion of administrative authority. That authority was neither exhausted nor terminated by its exertion on that occasion, but was in its nature continuing."
>
> *Wilbur* v. *U. S.* ex rel *Kadrie* et al, 281 U. S. 206.

> "The power of supervision may be exercised by the Secretary whether these proceedings are called to his attention by formal notice or by appeal. It is sufficient that they are brought to his notice. The rules prescribed are designed to facilitate the Department in the dispatch of business, not to defeat the supervision of the Secretary."
>
> *Knight vs. United States Land Assn., 142 U. S. 161.*

Besides, the procedure was distinctly authorized by the rules of practice. *Rule* (*48 L. D., 261*), provides:

> "No rule here prescribed shall be construed to deprive the Secretary of the Interior of any direct or supervisory power conferred upon him by law."

And since Hardeman had a full and complete hearing, both orally and by brief, on his final motion for rehearing (R. 110–114), there is no room left for contention that any rights were arbitrarily denied him.

Nor was there any error committed by the Secretary, if that matter can be gone into.

(a) *Hardeman's application was invalid because not sworn to.*

Section 184 of Title 30 of the United States Code expressly requires that: "All statements, representations, or reports required by the Secretary of the Interior" under the provisions of the law regulating oil and gas permits "shall be upon oath, unless otherwise specified by him, and in such form and upon such blanks as the Secretary of the Interior may require."

Hardeman claimed a preference over Witbeck although the latter had filed his application 29 days before him. In order that he might have such preference it is necessary that his application comply with the law.

The opinion of the Circuit Court of Appeals, we submit, properly applied the analogy of an unsworn tax return (*Lucas vs. Pilliod Lbr. Co., 281 U. S. 245*) and an unsworn application for a patent (*Steward vs. American Lava Co., 215 U. S. 161*).

(b) *The Secretary was correct in holding that Hardeman's application without tender of fees conferred no rights.*

Section 2478 of the Revised Statutes (U. S. Code, Title 43, sec. 1201) confers direct authority "to enforce and carry into execution, by appropriate regulations, every part of the provisions of this title [public lands] not otherwise specially provided for."

Section 3 of the Leasing Act authorizes the Secretary "to prescribe fees and commissions to be paid to registers

and receivers of United States land offices on account of business transacted under the provisions of the act."

Section 31 of the regulations, under which the plaintiff's application was made (*47 L. D. 437, et seq.*), provides:

> "Under the authority of Section 38 of the act, the following fees and commissions are prescribed for transactions under the act:
>
> "(a) For receiving and acting on an application for a permit, lease or other right, filed in the district land office in accordance with these regulations, there shall be paid a fee of two dollars for each 160 acres or fraction in such application, but such fee in no case to be less than ten dollars, the same to be paid by the applicant and considered as earned when paid, and to be credited in equal parts on the compensation of the register and receiver within the limitations provided by law."

(See *47 L. D. 461.*)

Circular No. 616, providing for the method of keeping the records and accounts relating to public lands (*45 L. D. 518*), provides (*Section 8*):

> "Where no money is tendered, the application, etc., will be rejected. . . . You will not in such cases, pending the receipt of the money, segregate the land, as the law and regulations are specific in that the money must be tendered with the application, and if it is not transmitted the applicant acquires no rights under the application until the money is tendered."

Hardeman claimed a preference right for thirty days from November 11th. It was necessary, in order that such preference as he had be not lost, that his application in complete form be filed in the district land office within

the thirty days. His incomplete and informal application, accompanied neither by fees nor oath, was filed within thirty days. The regulations, however, prevented the application from having effect and denied the register the right to file it. Witbeck's application was already on file. When the thirty days elapsed without the payment of the fees, the preference right disappeared, the land was not segregated to any application, and it became subject to Witbeck's application for a permit. Such is the basis of the Secretary's decision. Since Hardeman's claim was based entirely upon his contention that he had a preference right, and since, admittedly, the preference right disappeared after December 11th, in the absence of a legal application, when the Secretary's attention was called to the fact that no legal application had ever been filed, he was entirely at liberty, and it was his duty, to hold that Hardeman had no preference right. Hardeman's right to maintain this equitable action rests upon his successful assertion that he did have a preference right. The very basis of his preference right was an application in proper form filed within the statutory period. Such application was never made, and the Secretary, in the proper exercise of his jurisdiction, held that the preference right did not exist.

It is respectfully submitted that the decree of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

SIDNEY L. HEROLD
FRANCIS W. CLEMENTS

Attorneys for Respondent

SUPREME COURT OF THE UNITED STATES.

No. 503.—October Term, 1931.

Jack Hardeman, Petitioner, *vs.* Albert T. Witbeck.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[May 23, 1932.]

Mr. Justice Butler delivered the opinion of the Court.

This suit was brought by petitioner in the district court for western Louisiana against respondent to have the former adjudged the beneficial owner of a permit issued May 6, 1925, by the Secretary of the Interior to respondent under § 13 of the Leasing Act,* granting the latter the right to prospect for oil and gas upon 40 acres of land in that State. That court entered a decree for petitioner. The Circuit Court of Appeals reversed. 51 F. (2d) 450.

Section 13 authorizes the Secretary, under such necessary and proper rules and regulations as he may prescribe, to grant to an applicant qualified under the Act a permit to prospect for oil or gas upon land wherein the deposits belong to the United States and are not within a known geological structure of a producing oil or gas field. It provides that, if one shall cause to be erected upon the land for which the permit is sought a monument and shall post a notice in specified form, he shall during the period of 30 days thereafter be entitled to a preference right over others to a permit on the land so identified. A regulation (§ 5 (b), 47 L. D. 441) declares that, if no application is filed within that time, the land will be subject to any other application or to other disposal. Pursuant to authority given him by § 38 the Secretary prescribed a schedule of fees and commissions for transactions under the Act: For receiving and acting on each application for a permit filed in the district land office there shall be charged a fee in no case to be less than $10, to be paid by the applicant and considered as earned

*Act of February 25, 1920, c. 85, 41 Stat. 437, 441.

when paid, and to be credited in equal parts on the compensation of the register and receiver. § 31 (a), p. 461.

On November 12, 1923, respondent complying with the law and regulations, applied for a permit to prospect upon the land and paid the required amount. December 11, petitioner, claiming the preference right given by the Act, filed an application for a permit to prospect upon the same tract. The substance of the application was that on November 11, he had erected the monument and posted a notice on the land as required by the statute. But he did not tender or pay the required fee until December 19. In the contest that followed it was finally held in an opinion promulgated by the Secretary that, petitioner having failed to pay the required amount within the time allowed, respondent was entitled to have the permit. 51 L. D. 36.

Petitioner's application was later than respondent's and he had no ground upon which to claim a permit in the absence of a preference right. In order to secure that right, full compliance with the law and regulations was necessary. The declaration that the fee is for "receiving and acting" on the application and is "to be considered as earned when paid" strongly confirms the inference, which would exist without it, that payment is essential to the completion of the application. When the thirty days expired, petitioner's preference right was at an end, and the land was subject to respondent's application for a permit.

As the Secretary rightly held petitioner not entitled to the permit, he has no standing to maintain this suit. *Fisher* v. *Rule,* 248 U. S. 314, 318. *Anicker* v. *Gunsburg,* 246 U. S. 110, 117.

Decree affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.